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Case Notes

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Alien's Deportation—*Boutilier v. Immigration & Naturalization Serv.*, 363 F.2d 488 (2d Cir. 1966).

CLIVE MICHAEL BOUTILIER, a native and citizen of Canada, was admitted into the United States for permanent residence on June 22, 1955 at the age of 21. Eight years later in the process of filing for citizenship, Boutilier admitted to the Immigration and Naturalization Service that he had had homosexual experiences, both before and after entry into this country. The Board of Immigration Appeals directed his deportation on the grounds that upon entry into this country, he was a homosexual and therefore excludable as a "psychopathic personality" within the meaning of section 212 (a) (4) of the Immigration and Naturalization Act of 1952 (Act).[1] On appeal the court *held*[2] that an alien's sworn statement admitting homosexual activities prior to his entry into the United States was sufficient evidence of his "psychopathic personality" to warrant his deportation under section 241 (a) of the Act.[3]

The power of Congress to exclude aliens is absolute.[4] Congress may exclude aliens altogether or may define the terms and conditions upon which they may come into or remain in this country.[5] Whatever procedure Congress authorizes to exclude an alien is due process as far as that alien is concerned.[6] Proceedings to deport,[7] however are not exempt from constitutional requirements.[8] In *Bridges v. Wixon*,[9] Mr.

[1] 66 Stat. 182 (1952), 8 U.S.C. §1182 (a) (4) (1964).
This section provides in pertinent part:
> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States
>
> * * * * * *
>
> (4) Aliens afflicted with a psychopathic personality, epilepsy, or a mental defect; . . .

[2] Boutilier v. Immigration & Naturalization Serv., 363 F.2d 488 (2d Cir.), *cert. granted*, 385 U.S. 927 (1966).

[3] 66 Stat. 204 (1952), 8 U.S.C. §1251 (a) (1964).
Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

[4] Chinese Exclusion Case, 130 U.S. 581 (1889).

[5] AM. JUR. (SECOND) *Aliens and Citizens* §49 (1962).

[6] Shaughnessy v. Mezi, 345 U.S. 206 (1953).

[7] 66 Stat. 208 (1952), 8 U.S.C. 1252 (b) (1964).

[8] Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950); see generally Note, *Constitutional Restraints on Expulsion and Exclusion of Aliens*, 37 Minn. L. Rev. 440 (1953).

[9] 326 U.S. 135, 161 (1945).

Justice Murphy said, in a concurring opinion, that "once an alien lawfully enters and resides in this country, he becomes vested with rights guaranteed by the Constitution to all people within our borders." More specifically, it has been held that a resident alien is a proper party to question the constitutionality of a statute affecting him.[10]

In the instant case Boutilier contended that the statutory language "psychopathic personality" is void for vagueness. The question of vagueness most frequently arises in construing penal statutes. There the underlying principle is that no man should be held criminally responsible for conduct that he could not reasonably expect to be proscribed.[11] However, the Supreme Court has applied this principle in civil proceedings[12] and in *Jordan v. DeGeorge*,[13] the court examined for vagueness a statute involved in deportation proceedings. There, where an alien was convicted of defrauding the government of liquor tax revenue, the court held that the statutory language "crime involving moral turpitude"[14] afforded an alien sufficient notice that conviction of such a crime would result in deportation.

In *Fleuti v. Rosenberg*,[15] the first case to consider, the vagueness, section 212 (a) (4) of the Act, the Ninth Circuit reversed an order of deportation on the ground that the statutory language "psychopathic personality" failed for vagueness as applied to deport a homosexual when the deportation order was based in part on evidence of post-entry behavior. The court reasoned that the statute failed to give petitioner notice that the continued practice of homosexual activity after entry might subject him to prosecution and deportation as evidencing a prohibited condition before entry. "While the post-entry conduct was not itself the ground of deportation, but was used as evidence of a pre-entry deportable condition, the prejudice would nevertheless be substantial."[16] In a similar case[17] the Ninth Circuit in a *Per Curiam* opinion relied on *Fleuti* as controlling. It is interesting to note that the Immigration Act of 1965, amended section 212 (a) (4)[18] to specify sexual deviates as excludable. As this amendment was enacted after Boutilier's entry it is not applicable to him. The legislative history[19] of this amendment indicates that it is largely in response to the decision in *Fleuti*.[20] In the instant case, the immigration service became aware

[10] United States v. Ju Toy, 198 U.S. 253 (1924).
[11] United States v. Harriss, 347 U.S. 612, 617 (1953).
[12] Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233 (1925).
[13] Jordan v. DeGeorge, 351 U.S. 223 (1951).
[14] Immigration Act of 1917 § 19 (a), 39 Stat. 889.
[15] 302 F.2d 652 (9th Cir. 1962), *remanded on other grounds*, 374 U.S. 449 (1963).
[16] *Id.* at 656.
[17] Lavoie v. Immigration & Naturalization Serv., 360 F.2d 27 (9th Cir. 1966).
[18] 79 Stat. 919 (1965), 8 U.S.C. 1182 (1966).
[19] H.R. REP. No. 745, 89th Cong., 1st Sess. 16 (1965), to accompany H.R. 2580.
[20] *Id.* at 16.

However, the United States Court of Appeals for the Ninth Circuit on April 17, 1962, set aside a deportation order and enjoined its enforcement holding that Section 212 (a) (4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality." Fleuti v. Rosenberg, 302 F.2d 652.

To resolve any doubt the committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill.

of Boutilier's condition when he admitted in an affidavit submitted to a naturalization examiner as part of his application for citizenship, that he had been arrested in October 1959 on a charge of sodomy. In response to a request for additional information, Boutilier revealed that his first homosexual experience occurred in Canada when he was 14 years old, and that from the age of sixteen until he entered the country at twenty-one, he voluntarily engaged in homosexual activity three or four times a year. While Boutilier does not contend that the government failed to comply with the statutory procedures under which deportability is determined,[21] he does assert that section 212 (a) (4) is void for vagueness and that the order directing his deportation deprived him of due process.

The court viewed the delayed exclusion effect[22] of the act as furnishing "a backstop or check designed to intercept those whom Congress believed should not have been admitted into the United States in the first instance."[23] In applying section 212 (a) (4) excluding those aliens afflicted with a "psychopathic personality" the court conceded that this section is not a "model of clarity." The majority relied on legislative history quoting from *Quiroz v. Neely*.[24] "[W]hatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here."[25] In *Fleuti* the court reasoned that in deciding whether a statute fails for vagueness, the statute must be judged on its face without reference to legislative history.[26]

The majority did not find *Fleuti* authoritative, reasoning that in *Fleuti* the examining officer chose to rely heavily on post-entry behavior, while in the instant case there was no indication that the Special Inquiring Officer failed to understand that section 212 (a) (4) was directed solely at a pre-entry condition.

In rejecting *Fleuti* as not applicable, the court ignored the main thrust of the holding, specifically, that the statutory language "psychopathic personality" does not give adequate notice to an alien that certain post-entry conduct may be used to evidence a pre-entry condition which would subject him to deportation. In the instant case, the court emphasized that Boutilier could have been deported under the Act even if, after his entry, he had commenced leading a life of impeccable morality. However, one might conclude that if Boutilier had never been arrested for sodomy, after his entry into the country, immigration officials would never have had reason to question his sexual activities before entry.

[21] See statute note 7 *supra*.

[22] The delayed exclusion effect of the Act required the alien to be deported in two out of three possible factual situations. First, an alien may have been a "psychopathic personality" before entry into the country and not after. Second, an alien may have been a "psychopathic personality" both before and after entry. Third, an alien may become a "psychopathic personality" only after entry. The delayed exclusion effect of the Act can be used to deport aliens in the first and second hypotheticals but not in the third.

[23] Boutilier v. Immigration & Naturalization Serv., *supra* note 2, at 492.

[24] Quiroz v. Neely, 291 F.2d 906, 907 (5th Cir. 1961).

[25] Boutilier v. Immigration & Naturalization Serv., *supra* note 2, at 494.

[26] Fleuti v. Rosenberg, *supra* note 12, at 657.

Bankruptcy—Drawee Bank's Liability For Payment Of Checks—Without Notice of Voluntary Petition—*Bank of Marin v. England*, —— *U.S.* ——, 87 Sup. Ct. 274 (1966).

BETWEEN AUGUST 27, 1963 and September 17, 1963 Marin Seafoods drew five checks to Eureka Fisheries on its account with the Bank of Marin. On September 26, 1963, Marin Seafoods filed a voluntary petition in bankruptcy. On October 2, 1963 Eureka Fisheries presented the bankrupt's checks at the Bank of Marin, and they were accepted and paid. The bank had no notice of the bankruptcy of its depositor. The trustee in bankruptcy sought a turnover order from the referee who held both payee and bank liable. The District Court granted the order, and its decision was affirmed on appeal.[1] The Supreme Court granted certiorari.[2] The question presented was "whether a bank which honored checks by a depositor drawn before his bankruptcy but presented for payment after he had filed a voluntary petition in bankruptcy, is liable to the trustee for the amount of the checks paid where the bank had no knowledge or notice of the proceeding."[3] The Court reversed and held that the Bank of Marin was not liable.

Section 70 (a) of the Bankruptcy Act provides that a "trustee of the estate of a bankrupt . . . shall . . . be vested *by operation of law* with the title of the bankrupt *as of the date of the filing of the petition.*" (Emphasis added).[4]

The Supreme Court does not interpret this section to imply that "the bankrupt's checking accounts are instantly frozen in the absence of knowledge or notice on the part of the drawee of the bankruptcy."[5] The Court asserts that, although title to the bankrupt's property[6] passes to the trustee in bankruptcy, "the trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the petition."[7]

In *Allen v. Bank of America*,[8] it was decided that:

> [T]he relation of banker and depositor is founded on contract. The essence of the bank's obligation under such debtor and creditor contract is that in consideration of the deposit by the customer or depositor, the bank will whenever by the presentation of a genuine check in the hands of a person entitled to receive the amount of such check, a demand for payment is made, honor such check if sufficient funds to cover the amount are on deposit.[9]

[1] 352 F.2d 186 (9th Cir. 1965).
[2] 383 U.S. 906 (1966).
[3] Bank of Marin v. England, 87 Sup. Ct. 274 (1966).
[4] Bankruptcy Act § 70 (a), 52 Stat. 879 (1938), 11 U.S.C. § 110 (a) (1964).
[5] Bank of Marin v. England, *supra* note 3, at 276.
[6] Bankruptcy Act § 70 (a) (5), 52 Stat. 879 (1938), 11 U.S.C. § 110 (a) (5) (1964).
[7] Bank of Marin v. England, *supra* note 3, at 276. See Zartman v. First Nat'l Bank, 216 U.S. 134 (1910); Thompson v. Fairbanks, 196 U.S. 516 (1905).
[8] Allen v. Bank of America, 58 Cal. App.2d 124, 136 P.2d 345 (1943).
[9] Allen v. Bank of America, *supra* note 8, at 127. See also Weaver v. Bank of America, 59 Cal.2d 428, 431, 30 Cal. Rptr. 4, 7, 380 P.2d 644, 647 (1963). When such a contract is breached, the cases show that an action also sounds in tort. Siminoff v. James H. Goodman

The Court reasons that, because of this contractual obligation, "[T]he bank has the right and duty . . . to honor . . . checks . . . absent a revocation that gives the bank notice prior to the time the checks are accepted or paid by the bank."[10] The Court quotes from *Mullane v. Central Hanover Bank & Trust Co.*[11] to illustrate that the proper notice requirement: "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ."[12]

The filing of a petition in bankruptcy, however, has been pronounced by the Supreme Court in *Mueller v. Nugent*[13] as,

> . . . a *caveat* to all the world and in effect an attachment and injunction . . . and on adjudication, title to the bankrupt's property became vested in the trustee, §§70, 21 *e* with actual or constructive possession, and placed in the custody of the bankruptcy court.[14]

This doctrine would clearly seem to imply that after adjudication the contract between bank and depositor is void; adjudication therefore operates "as a revocation of the drawee's authority,"[15] even though no notice has been given to the bank.[16]

In *Bank of Marin,* the petition in bankruptcy was voluntary and such a voluntary petition is considered adjudicated immediately upon filing,[17] and, therefore, the *caveat* doctrine would apply.

In *Lake v. New York Life Ins. Co.,*[18] the court pointed out that there was much confusion concerning the application the *caveat* doctrine and that some courts,

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Co. Bank, 18 Cal. App. 5, 121 Pac. 939 (1912); Reeves v. First Nat'l Bank, 20 Cal. App. 508, 129 Pac. 800 (1912).

[10] Bank of Marin v. England, *supra* note 3, at 276.

[11] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949).

[12] *Id.* at 314. See Covey v. Town of Sumers, 351 U.S. 141 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); City of New York v. New York, N. H. & H. R.R., 344 U.S. 293 (1952). See also Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1913); Priest v. Las Vegas, 232 U.S. 604 (1913); Roller v. Holly, 176 U.S. 398 (1899). "The right to a hearing is meaningless without notice." Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956). "[Stop—] order must be received at such time and in such manner as to afford bank a reasonable opportunity to act . . . ."UNIFORM COMMERCIAL CODE § 4-403 (1). BRITTON, BILLS AND NOTES 520, § 181 & n.3 (2d ed. 1961).

[13] 184 U.S. 1 (1902).

[14] *Id.* at 14. See May v. Henderson, 268 U.S. 111 (1925); Meek v. Centre County Bkg. Co., 264 U.S. 499 (1924); Lazarus v. Prentice, 234 U.S. 263 (1914); Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300 (1911); Clay v. Waters, 178 Fed. 385, (8th Cir. 1910); Babbit v. Dutcher, 216 U.S. 102 (1910).

[15] Bank of Marin v. England, *supra* note 1, at 191.

[16] "The mutual accounts between a bankrupt and his bank of deposit are closed by operation of law at the time the petition in bankruptcy is filed." *In re* Fuller, 294 Fed. 71 (2d Cir. 1923); Harrison State Bank v. First Nat'l Bank, 116 Neb. 456, 218 N.W. 92 (1928); Guthrie Nat'l Bank v. Gill, 6 Ore. 560, 54 Pac. 434 (1898); BRADY, BANK CHECKS 25 (3rd ed. 1962).

[17] Bankruptcy Act §18 (b), 52 Stat. 851 (1938), 11 U.S.C. §41 (b) (1964). "An adjudication of bankruptcy is a notorious judicial act of which all persons are bound to take notice." Southern Ry. v. Cole, 49 Ga. App. 635, 176 S.E. 512 (1934). Although there was some "confusion and uncertainty" concerning the application of the *caveat* doctrine to bona fide transfers between filing and adjudication, yet "it was undisputed that after bankruptcy, all

held that payments to the bankrupt after the filing of the petition were invalid, while in others it was held that the trustee took the property at the date of adjudication and that prior transactions between the bankrupt and persons without notice were not affected.[19]

Section 70 (d) of the Bankruptcy Act[20] was added in the revision of the statute by the Chandler Amendments.[21] It was the intention of Congress[22] that the enactment of this section "invalidate transactions not granted specific protection under the Act and thus put to an end the confusion theretofore existing in the decisions."[23]

Section 70 (d) (5) of the Bankruptcy Act provides that "except as otherwise provided in this subdivision and in subdivision g of section 21 of this Act [not applicable here] no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee; *provided, however,* That nothing in this Act shall impair the negotiability of currency or negotiable instruments."[24] This section[25] seems conclusively to deny protection to the transfer in *Bank of Marin,* except for the proviso clause which raises the issue whether holding the bank liable in *Bank of Marin* would impair negotiability.[26]

In *Rosenthal v. Guaranty Bank & Trust Co.*,[27] the court held that:

One of the purposes of the negotiability clause . . . is to protect banks who in good faith . . . and without actual knowledge of the bankruptcy, honors [sic] checks drawn on it by the bankrupt and especially is this true when, as here the checks were drawn before the filing of the petition.[28]

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transfers of the bankrupt's property both by or to innocent parties were nonetheless invalid." 4 COLLIER, BANKRUPTCY ¶ 70.66, at 1498 (14th ed. 1964).

[18] 218 F.2d 394 (4th Cir. 1955).

[19] *Id.* at 397. The court refers to discussion in Stone v. Superior Fire Ins. Co., 278 Pa. 400, 123 Atl. 333 (1924).

[20] 55 Stat. 882 (1938), 11 U.S.C. § 110 (d) (1964).

[21] See McLaughlin, *Aspects of the Chandler Act,* 4 U. CHI. L. REV. 341 (1937).

[22] See H.R. REP. No. 1409, 75th Cong., 1st Sess. 35 (1937); *Hearings on H.R. 6439 Before the House Committee on the Judiciary,* 75th Cong., 1st Sess. 211, 212 (1937); 4 COLLIER, BANKRUPTCY ¶70.67, 70.68, at 1499-1512 (14th ed. 1964). McLaughlin, *Amendment to the Bankruptcy Act,* 40 HARV. L. REV. 583 (1927).

[23] Lake v. New York Life Ins. Co., *supra* note 18, at 399. "[P]rotection ceases upon the adjudication or when a receiver takes possession, and a third party may have no more actual notice of the adjudication than of the petition. . . . Protection stops at the adjudication . . . because the bankrupt is then no longer entitled to the consideration due a person against whom an unfounded petition may have been filed." MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY 346 (1956). Some examples of protection afforded between filing and adjudication or appointment of trustee whichever first occurs: Cunningham v. Lexington Trust Co., 259 Mass. 181, 156 N.E. 1 (1927); Stevens v. Bank of Manhatten Trust Co., 11 F. Supp. 409 (S.D.N.Y. 1931); Citizens' Union Bank v. Johnson, 286 Fed. 527 (6th Cir. 1923); *In re* Zotti, 186 Fed. 84 (2d Cir. 1911), *cert. denied,* 223 U.S. 718 (1911); Feldman v. Capitol Piece Dye Works, Inc., 293 F.2d 889 (1961), *cert. denied,* 368 U.S. 948 (1961).

[24] Lake v. New York Life Ins. Co., *supra* note 18, at 399.

[25] 52 Stat. 882 (1938), 11 U.S.C. § 110 (d) (5) (1964).

[26] "[T]he draftsmen of the 1938 Act wished to avoid any implication that the restrictive measures introduced could be taken as a modification of the negotiable instruments law." 4 COLLIER, BANKRUPTCY ¶70.68, at 1502 (14th ed. 1964).

[27] 139 F. Supp. 730 (W.D. La. 1965). This case and *Bank of Marin v. England* appear to be the only cases dealing with this particular issue. Bank of Marin v. England, *supra* note 1, at 190-91.

[28] *Id.* at 736.

However, a law review commented:[29]

> In all the cases relied on by [Rosenthal] . . . the payments were made before adjudication . . . [and] the bank was protected for reasons equally applicable to any debtor of the bankrupt and not because it was the drawee of negotiable instruments.[30]

It is also important to note that the presentment and payment of the bankrupt's checks by the Bank of Marin is not a negotiation.[31] For this reason, it would seem that the proviso clause is not applicable.

The Supreme Court in *Bank of Marin* insists that it "does not read these statutory words [section 70 (d) (5)] with the ease of a computor. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."[32]

In *Pepper v. Litton*,[33] the Court stated that bankruptcy courts "have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."[34]

In *Securities Commission v. United States Realty Co.*,[35] the Court said, "A bankruptcy court is a court of equity and is guided by equitable doctrines and principles," but it added immediately, "except in so far as they are inconsistent with the Act."[36] There's the rub! "Equitable principles are not applicable in bankruptcy where they are in conflict with the provisions of the Bankruptcy Act."[37]

[29] Comment, 70 HARV. L. REV. 548 (1951).

[30] *Id.* at 549. *Cf.* 4 COLLIER, BANKRUPTCY ¶70.68, at 1502-03 n.3 (14th ed. 1964). It is also contended that the proviso was not meant for so broad an interpretation as *Rosenthal* allows it. "The effect of the proviso might well be limited to the situation where A obtains for antecedent value a negotiable instrument from B who in turn received it from the bankrupt for inadequate present consideration. Any broader construction would gravely hamper the proper allocation of the bankrupt's assets with doubtful benefits to negotiation." Note, *Bankruptcy and Negotiable Instruments*, 64 HARV. L. REV. 958 (1951).

[31] "The return of the instrument to the maker, acceptor or drawee upon receipt of payment is not a negotiation of the instrument within the meaning of section 30 [N.I.L.] nor a transfer within the meaning of section 49 [N.I.L.], but is a surrender in response to the legal duty to do so which is imposed by section 74 [N.I.L.]." BRITTON, BILLS AND NOTES § 49, at 118 (2d ed. 1961). See Shammos v. Boyett, 114 Cal. App. 2d 139, 144, 249 P.2d 880, 883 (1952); Fidelity & Deposit Co. of Maryland v. Marion Nat'l Bank, 116 Ind. App. 453, 64 N.E.2d 583 (1946); Aurora State Bank v. Hayes-Eames Elevator Co., 88 Neb. 187, 129 N.W. 279 (1911); First Nat'l Bank v. United States Nat'l Bank, 100 Ore. 264, 286-89, 197 Pac. 547, 555 (1921); Seligson, *Creditors' Rights*, 32 N.Y.U.L. REV. 708, 730-31 (1957); 4 COLLIER, BANKRUPTCY ¶70.68, at 1502-03 n.3 (14th ed. 1964).

[32] Bank of Marin v. England, *supra* note 3, at 277. See Bankruptcy Act § 2 (a), 52 Stat. 842 (1938), 11 U.S.C. § 11 (a) (1964).

[33] 308 U.S. 295 (1939).

[34] *Id.* at 304-05. "[C]ourts of bankruptcy are essentially courts of equity and their proceedings inherently proceedings in equity." Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934). See also Larson v. First State Bank, 21 F.2d 936 (8th Cir. 1927).

[35] 310 U.S. 434 (1940).

[36] *Id.* at 455. See also American United Mut. Life Ins. Co. v. Avon Park, 311 U.S. 138 (1940); *In re* Keystone Realty Holding Co., 117 F.2d 1003 (3d Cir. 1941); United States v. Killaren, 119 F.2d 364 (8th Cir. 1941), *cert. denied*, 314 U.S. 640 (1941); Sylvan Beach v. Kock, 140 F.2d 852 (8th Cir. 1944); Smith v. Chase Nat'l Bank, 84 F.2d 608 (8th Cir. 1936); Southern Bell Tel. & Tel. Co. v. Caldwell, 67 F.2d 802 (8th Cir. 1934); *In re* Columbia Ribbon Co., 117 F.2d 999 (3d Cir. 1941).

[37] 9 AM. JUR. 2d *Bankruptcy* § 38 (1963).

To solve the ambiguities inherent in a case like *Bank of Marin,* the legislature has provided the trustee with explicit and carefully defined powers, and "the trend, since the Chandler Act, has been to confine legislation in this field to clarifying existing provisions and expediting procedure without radical innovation or upsetting the basic structure."[38] "The needs of bankruptcy administration require that meddling with the estate be limited."[39] Collier comments:

> In order to remove the bankrupt's remaining property from his hands and to facilitate its proper disposition in the interests of his creditors, it is considered essential that the liquidation officer—the bankruptcy trustee—be given full title to such property with all the rights appertaining thereto.[40]

The whole thrust of the Chandler Amendments discussed above was to set more accurate guidelines under law,[41] and the court, in *Lake v. New York Life Ins. Co.,* admonishes: "Whether the line which has been drawn [by the legislature] is the best possible solution of the problem is not for the courts to say."[42]

[38] 9 AM. JUR. 2d *Bankruptcy* § 3 (1963).
[39] MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY 346 (1956).
[40] 4 COLLIER, BANKRUPTCY ¶70.01, at 926 (14th ed. 1964).
[41] Bank of Marin v. England, *supra* note 3, at 281.
[42] *Supra* note 18, at 399.

Constitutional Law—Criminal Law—Credit Denied for Sentence Served Pursuant to Reversed Conviction—*State v. King,* 180 Neb. 631, 144 N.W. 2d 438 (1966).

ON HIS PLEA OF GUILTY David King was sentenced to an eight year term in the Nebraska State Penitentiary. His crime was robbery for which he served five years and three months before his conviction was reversed. At a second trial King was again convicted of robbery and sentenced to four years at hard labor. On appeal,[1] King's contention was that by the terms of the second sentence he is required to serve a total of more than nine years, that credit must be given him for the time which he spent in prison on the first conviction. Rejecting this argument, the Supreme Court of Nebraska, *held,* where a conviction and sentence are void and on a subsequent trial a new sentence is imposed, a defendant is not entitled to credit, as a matter of law, for time served under the original void conviction and sentence, and that any crediting of time is a matter of discretion for the sentencing court.[2]

Multi-jurisdictional decisions on the issue of credit for time served have been based on four major premises. First, statutory law provides for a grant of credit.[3]

[1] State v. King, 180 Neb. 631, 144 N.W.2d 438 (1966).
[2] *Id.* at 634, 144 N.W.2d at 440.
[3] See, *e.g.,* State *ex rel.* Bone v. Barr, 133 Iowa 132, 110 N.W. 280 (1907); *Ex parte* James, 38 Cal.2d 302, 240 P.2d 596 (1952); *Ex parte* Levi, 39 Cal.2d 41, 244 P.2d 403 (1952); People

Second, statutory law forbids credit.[4] Third, the trial court in the exercise of its discretion may grant credit.[5] Fourth, as a matter of law, absent legislative authority, there is nothing for which credit must be granted; the reversed conviction is void and the sentence is null and void.[6]

Relying on the latter two of the foregoing premises, the Nebraska court said the trial court may take into consideration the fact that the defendant had been confined under a void sentence.[7] But, the defendant was not, as a matter of law, entitled to credit on the second sentence for time served under the original "void conviction and sentence."[8]

The result in *King* is not unlike the results reached in the majority of like-cases;[9] Nebraska has similarly disposed of the credit issue[10] before. Yet the question may be asked whether the issue is one of state law or constitutional due process.[11] It has been held that the due process clause bars the *King* result.[12]

The court in *King* issued a warning to would-be petitioners. Quoting *Shupe v. Sigler*,[13] it said that for many the bright rainbow and hopes engendered by *Fay v. Noia*[14] and other habeas corpus cases decided by the United States Supreme Court, may turn out to be an illusory rainbow with only a "pot of fool's gold" for its seeker.[15] By that reference the Nebraska court has, itself, raised the question of whether the right to a fair trial is free or attended with possible penalty.

In *Green v. United States*[16] the Supreme Court, adopting Justice McKenna's dis-

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v. Havel, 134 Cal. App.2d 213, 285 P.2d 317 (1955); *In re* Turrieta, 54 Cal.2d 816, 356 P.2d 681 (1960); State v. Dehler, 257 Minn. 549, 115 N.W.2d 358 (1962); Application of Kenton, 371 P.2d 742 (Okla. Crim. 1962).

[4] State *ex rel.* Nelson v. Ellsworth, 148 Mont. 78, 375 P.2d 316 (1962).

[5] See, *e.g.*, People *ex rel.* Stokes v. Warden, 66 N.Y. 342 (1876); Commonwealth v. Murphy, 174 Mass. 396, 54 N.E. 860 (1899); People v. Farrell, 146 Mich. 264, 109 N.W. 440 (1906); Hale v. Commonwealth, 137 Va. 774, 119 S.E. 49 (1923); People v. Ancksornby, 231 Mich. 271, 203 N.W. 864 (1925); People v. Gutterson, 244 N.Y. 243, 155 N.E. 113 (1926); State v. Malusky, 59 N.D. 501, 230 N.W. 735 (1930); State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938); People v. Ashworth, 264 App. Div. 201, 35 N.Y.S.2d 66 (1942); People v. Heard, 396 Ill. 215, 71 N.E.2d 321 (1947); Commonwealth *ex rel.* Townsend v. Burke, 361 Pa. 35, 63 A.2d 77 (1949); Tilghman v. Mayo, 82 So.2d 136 (Fla. 1955); Vellucci v. Cochran, 138 So.2d 510 (Fla. 1962); Woolford v. Warden, 215 Md. 640, 137 A.2d 646 (1958); Application of Cannon, 203 Or. 629, 281 P.2d 233 (1955).

[6] See, *e.g.*, Ogle v. State, 43 Tex. Crim. Rep. 219, 63 S.W. 1009 (1901); McCormick v. State, 71 Neb. 505, 99 N.W. 237 (1904); *Ex parte* Gunter, 193 Ala. 486, 69 So. 442 (1915); *Ex parte* Wilson, 202 Cal. 341, 260 P. 542 (1927); De Benque v. United States, 85 F.2d 202 (D.C. Cir. 1936); Smyth v. Midgett, 199 Va. 727, 101 S.E.2d 575 (1958); Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); State v. Anderson, 262 N.C. 491, 137 S.E.2d 823 (1964).

[7] State v. King, *supra* note 1, at 634, 144 N.W.2d at 440.

[8] *Ibid.*

[9] *Supra* notes 5 and 6.

[10] Knothe v. State, 115 Neb. 119, 211 N.W. 619 (1926); Crommett v. State, 115 Neb. 399, 213 N.W. 743 (1927); *Ex parte* Cole, 103 Neb. 802, 174 N.W. 509 (1919).

[11] Patton v. North Carolina, 256 F.Supp. 225 (W.D. N.C. 1966).

[12] *Ibid.*

[13] 230 F.Supp. 601 (D. Neb. 1964).

[14] 372 U.S. 391 (1963).

[15] State v. King, *supra* note 1, at 635, 144 N.W.2d at 440.

[16] 355 U.S. 184 (1957).

senting opinion in *Trono v. United States*,[17] said that the state seeks no convictions except in legal ways and for that reason it freely affords the means to review rulings and judgments. The exercise of constitutional rights is not clogged with conditions or forfeit.[18] Another case[19] answered that the administration of federal justice required rejection of the theory that a person may be punished because in good faith he defended himself when charged with a crime even though his effort proved unsuccessful.[20] In *United States v. Boyce*[21] the defendant appealed a more severe sentence than his original and pleaded that the more severe sentence penalized him in his exercise of the right to appeal. The court there said that if it had been the intent of the trial judge to dissuade the exercise of the right of appeal it would be quick to condemn the practice, but the second trial included disposition of additional charges.[22]

Two days before the decision in *King*, the United States District Court for the Western District of North Carolina reviewed a state court sentence which took no cognizance of the credit issue.[23] The circumstances closely paralleled those in *King*. In granting credit, the court said: "[D]enial of credit at a second trial for time served while in the de facto status of state prisoner is so fundamentally unfair as to constitute a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution."[24] The court held that the imposition of a harsher penalty, whether by denial of credit for time served or by increased sentence, without there being contained in the record any facts tending to rationally support the imposition of such a penalty, inhibits the right to petition for a new trial and unconstitutionally conditions that right.[25]

There are other grounds on which credit might have been granted in *King* and similar cases.[26] In the instant case, the court stated that both the conviction and sentence were void.[27] One year and three months, which the appellant had spent in confinement, was treated as a complete nullity.

Time served in prison is not to be considered a nullity, the United States Supreme Court has said, if the sentencing court had jurisdiction.[28] Nebraska has followed that

[17] 199 U.S. 521, 539 (1905).
[18] Green v. United States, *supra* note 16, at 196.
[19] United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).
[20] *Id.* at 504.
[21] 352 F.2d 786 (4th Cir. 1965).
[22] *Id.* at 787.
[23] Patton v. North Carolina, *supra* note 11.
[24] *Id.* at 236.
[25] *Ibid.*
[26] See cases cited notes 3-6 *supra*.
[27] State v. King, *supra* note 2, at 634, 144 N.W.2d 440.
[28] *Ex parte* Watkins, 28 U.S. (3 Pet.) 650, 655 (1830). Mr. Chief Justice Marshall stated:
> The declaration that this judgment against a person to whom the jurisdiction of the court could not extend is a nullity, is no authority for inquiring into the judgments of a court of general criminal jurisdiction, and regarding them as nullities, if, in our opinion, the court has misconstrued the law, and has pronounced an offence to be punishable criminally, which, as we may think, is not so.

Ex parte Siebold, 100 U.S. 371, 375 (1879) says:
> This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex Parte Lange* (18 Wall 163) and *Ex Parte Parks* 93 U.S.

reasoning.[29] Its Supreme Court has observed that if the court had jurisdiction of the person of the accused and of the crime charged in the information, and did not exceed its lawful authority in passing sentence, its judgment is not void, "whatever errors may have preceded the rendition thereof."[30] It has further stated that: "The validity of judicial orders and judgments does not depend upon the reason for the court's action, but upon the possession by it of lawful authority to hear and determine the matter before it."[31]

The trial court had jurisdiction of the person of the accused and of the crime. It did not exceed its lawful authority in passing sentence.[32] Yet the court gave no reason why King's sentence should be considered void in contravention of the foregoing. However, courts have held that when the defendant successfully attacks the conviction, it is rendered null and void;[33] the defendant has waived further consideration of the first sentence.[34] The theory of successful appeal absolutely voiding a conviction and sentence is thought to have its root in the writ of habeas corpus, as a method for reviewing criminal cases and avoiding the bar of double jeopardy.[35]

A typical verbalization[36] of the reversed conviction being *quid pro quo* a void conviction is made in *Minto v. State*.[37] There the court said the defendant could not have served any part of a former sentence of imprisonment, since there had been no such sentence which the law could recognize.[38] One court has called this distinction "a result seemingly more consistent with dry logic than natural justice."[39] Another court[40] rejecting this reasoning, but denying credit on other grounds, said:

> The Government's brief suggests in the vein of The Mikado, that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary;' that since he should not have been imprisoned at all ... it might be suggested that he is liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses. We cannot take this optimistic view. Though appellant's first sentence was void, he was threatened with and suffered imprisonment under it.[41]

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18. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.

[29] See, State *ex rel.* Ream v. Leidigh, 54 Neb. 667, 75 N.W. 24 (1898); Hickman v. Fenton, 120 Neb. 66, 231 N.W. 510 (1930).

[30] State *ex rel.* Ream v. Leidigh, *supra* note 29, at 669, 75 N.W. at 24.

[31] *Id.* at 669, 75 N.W. at 24-25.

[32] NEB. REV. STAT. § 28-414 (1943).

[33] *Supra* note 6.

[34] People *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808, 811 (1931).

[35] Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 240-44 (1951).

[36] Agata, *Time Served Under A Reversed Sentence or Conviction—A Proposal and A Basis For Decision*, 25 MONT. L. REV. 3, 37 (1963).

[37] 9 Ala. App. 95, 64 So. 369 (1913).

[38] *Id.* at 97, 64 So. at 370.

[39] *Ex parte* Williams, 63 Okla. Crim. at 395, 75 P.2d at 906 (1938).

[40] King v. United States 98 F.2d 291 (D.C. Cir. 1938).

[41] *Id.* at 293-94.

In *Commonwealth v. Murphy*[42] the resentence exceeded the first sentence and with both sentences a day's solitary confinement was imposed, though the limit was one day. But in *Lewis v. Commonwealth*[43] the court stated that *Commonwealth v. Murphy*[44] did not hold the first sentence was to be ignored but that credit for time served was given in that case and that *Murphy* held time served under a reversed sentence must be deducted from the maximum permissible for the offense which is the final basis of sentence.[45] *Lewis* also stated that it was not even technically correct to say that the first sentence must be deemed a nullity, as it was not a nullity, when it was imposed or while it was being served. "The court had jurisdiction over the crime of robbery and had jurisdiction over the defendant. The sentence was erroneous and voidable for error but was not void until reversed."[46] The court was making the point that, during the time spent in prison, the sentence was not void but voidable and the appellant was asking credit for time spent in prison while the judgment was voidable and not yet void.

By the foregoing the first sentence in *King* may not have been null and void and credit might have been granted.

The holding in *State v. King* is not unusual. It is in the mold of a line of appeals seeking credit. But, attorneys for prospective appellants will understand there exists a possibility of detriment to their clients in seeking to overturn an unfair conviction. This involves speculation. It presumes that an attorney will decide whether a successful appeal will be followed by retrial and, if so, what the outcome will be. Such demands on an attorney require more ritualistic formulas than the law we live under provides. It necessitates bartering time spent in prison against the right to a fair trial, something not required of defendants being tried for the first time.

[42] 174 Mass. 396, 54 N.E. 860 (1899), *aff'd*, 177 U.S. 155 (1900).
[43] 329 Mass. 445, 108 N.E.2d 922 (1952).
[44] *Supra* note 42.
[45] Lewis v. Commonwealth, *supra* note 43, at 447, 449-50, 108 N.E.2d at 924, 926.
[46] *Id.* at 448, 108 N.E. 2d at 923.

Criminal Law—Grand Jury—Hearsay Evidence—*United States v. Payton*, 363 F.2d 996 (2d Cir. 1966).

On October 3, and again on October 10, 1963, James Payton sold an ounce of cocaine to Federal Bureau of Narcotics undercover Agent Cockerville for $600 per ounce. After close surveillance, Payton was arrested at his Manhattan apartment on November 20 and charged with violation of sections 4705 (a) and 7237 (b) of the Internal Revenue Code.[1] Upon indictment, the only witness to appear before the grand jury for the government was Agent Ward, an associate of Cockerville, who

[1] The two sections used by the government are the standard ones used for conviction in the narcotics cases. One section makes it unlawful for any person, to sell, trade, barter, or in any way exchange narcotics except by written, authorized order. Int. Rev. Code of 1954,

related conversations between Cockerville and Payton which he never actually heard. At the trial, however, the government relied primarily upon the testimony of Cockerville, and Ward's testimony was limited to the relatively unimportant surveillance techniques. It does not appear from the transcript of the grand jury testimony that the grand jurors were advised that what they were hearing was, in effect, hearsay evidence. Upon appeal, the Second Circuit, *held,* that a prosecutor or witness appearing before a grand jury does not have an *affirmative* duty to disclose to the grand jury that the evidence presented is hearsay.

Although the federal courts[2] are bound by the command of the fifth amendment that an indictment is necessary to hold an accused for a capital or otherwise infamous[3] crime, there is no constitutional guide for the proceedings before a grand jury. This lack of constitutional direction, coupled with the peculiar origin[4] and development[5] of the grand jury system is responsible for the outstanding characteristic of the system, which is still with us,—its *secrecy*.[6] It is no overstatement to say that "Grand jury proceedings have long enjoyed a character almost sacrosanct."[7] In view of the aura of secrecy which surrounds the proceedings before a grand jury, it is not surprising to find that the question of admissibility of evidence before a grand jury is one of the great unsettled areas of the law.

Functionally, the grand jury is not, as it was in England[8] at one time, a body which tries[9] public offenders, but it is essentially an inquisitorial[10] and accusatorial[11] body. Its primary purpose is to determine whether there is probable cause to warrant a trial on the merits—it need go no further.[12] Ideally, the proceedings should be governed by the same rules of evidence present at a jury trial; practically, this is not always possible and is not thte rule followed.[13] It is generally established that witnesses before the grand jury are not limited to the technical rules of evidence established to insure the rights of the accused in the courtroom.[14] Since the indictment consti-

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§ 4705 (a). The other sets the penalty for violation of this section which is imprisonment for two to five years and a fine not exceeding $2,000 (for the first offense). INT. REV. CODE of 1954, § 7237 (b).

[2] The fifth amendment requirement for an indictment applies only to federal jurisdiction and not for prosecutions in state courts. See Nottebaum v. Mayo, 173 F.2d 574 (5th Cir.), *cert. denied,* 337 U.S. 933 (1949).

[3] United States v. Sloan, 31 F. Supp. 327 (W.D.S.C. 1940). See also Green v. United States, 356 U.S. 165 (1958) ("infamous" crime is one punishable by imprisonment in a penitentiary.)

[4] The grand jury was instituted to protect the right of the individual from arbitrary persecution by the Crown. See Olmstead v. United States, 19 F.2d 843 (9th Cir. 1927).

[5] The courts have historically held the grand jury proceedings in the strictest of confidence and would never allow investigations to be made concerning its activities. See United States v. Goldman, 108 F.2d 516 (9th Cir. 1939).

[6] *Ibid.*

[7] Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir.), *cert. denied,* 373 U.S. 904 (1963).

[8] United States v. Olmstead, 7 F.2d 756 (W.D. Wash. 1925).

[9] United States v. Atlantic Commission Co., 45 F. Supp. 187 (D.N.C. 1943).

[10] *In re* Grand Jury Investigation, 226 F. Supp. 484 (S.D.N.Y. 1964).

[11] Blair v. United States, 250 U.S. 273 (1932).

[12] United States v. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960).

[13] Brady v. United States, 24 F.2d 405 (8th Cir. 1928).

[14] Murdick v. United States, 15 F.2d 965 (8th Cir. 1926); see also United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

tutes merely a preliminary hearing and the accused is still entitled to his day in court, the courts will rarely dismiss an indictment even though the evidence presented would undoubtedly have been struck down at the trial. The rule which was followed was that if there was *any* competent evidence whatsoever presented,[15] the indictment was valid, even if some of the evidence was tainted. Thus, indictments were upheld even though there was evidence presented which was: hearsay,[16] illegally obtained,[17] or self-incriminating.[18]

The qualification that there must be at least some competent evidence to prevent dismissal of an indictment lingered until 1956 when the Supreme Court handed down its decision in *Costello v. United States*.[19] Justice Black, speaking for the Court, held that an indictment based *solely* on hearsay evidence was valid if returned by a legally constituted and unbiased grand jury. "The fifth amendment," said the Court, "requires nothing more."[20] There is no doubt that practical considerations were foremost in the Court's mind in denying the defendant's motion to quash the indictment:

> If indictments were to be held open to challenge on the ground that there was inadequate or incapable evidence before the grand jury, the resulting delay would be great indeed.[21]

The broad sweep of the majority opinion was limited somewhat by the concurring opinion of Justice Burton. While agreeing with the Court's denial of the motion to quash, he warns the courts that they must exercise this power when there is "substantial or rationally persuasive evidence"[22] of prejudice to the accused. The doctrine expounded by *Costello* won immediate recognition and became the landmark case in the area. It was extended by the opinion in *Lawn v. United States*[23] to include any incompetent evidence. In *Pittsburgh Plate Glass Co. v. United States*[24] the Court went as far as to hold the knowledge of the grand jurors themselves was sufficient and an indictment was valid even though there was no evidence at all presented.

The federal courts have liberally interpreted the decisions handed down by the Supreme Court. The Second Circuit has provided the most liberal interpretation yet by holding in *Payton* that not only could the grand jury hear hearsay evidence exclusively, but it need not be apprised of this fact.

Payton based his appeal on two major points: *first,* that the failure to inform the grand jury that it was listening to hearsay evidence constituted a denial of due process; *second,* that such procedure used by the government is a "prosecutorial prac-

[15] United States v. Frontier Asthma Co., 69 F. Supp. 994 (W.D.N.Y. 1947).
[16] Holt v. United States, 218 U.S. 245 (1927).
[17] *Supra* note 8.
[18] United States v. Garnes, 156 F. Supp. 467 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530, *cert. denied*, 359 U.S. 937 (1959).
[19] 350 U.S. 359 (1956).
[20] *Id.* at 362.
[21] *Id.* at 363.
[22] *Id.* at 364.
[23] 355 U.S. 339 (1958)
[24] 360 U.S. 395 (1960).

tice"[25] designed to circumvent the appellant's rights. The first point raised by the appeal is the conventional one and Judge Feinberg, speaking for the court, had little trouble dismissing it. The court admitted that the exact point in question was not decided by the Supreme Court in *Costello,* but held that the *tenor* of that decision militated against the appellant's claims. The presumption of validity raised by an indictment[26] has not been sufficiently rebutted. The second point, couched in terms of "prosecutorial practice" raises an interesting problem and one not so easily dismissed by the court. In what manner has the appellant been deprived of his rights? This is accomplished, claims Payton, by withholding from the grand jury witnesses whose testimony there might afford a basis for impeachment of their later testimony at trial. The majority opinion does not agree with this contention, however. What the appellant has done, says the court, is to take a "rule of access" and turn it upside down to constitute a requirement that a witness appearing before a jury must have also appeared before the grand jury proceedings. The court does not deny that upon a showing of good cause[27] the defendant in a criminal trial is allowed access to the grand jury minutes for the purpose of pointing out inconsistencies with the trial testimony.[28] Yet, in upholding the conviction, the court emphasizes that this cannot be construed as a requirement that a witness appear before both grand jury and petit jury so that an inconsistency, if produced, may be pointed out. The court finally suggests that the appellant's real claim is in the insufficient discovery process in criminal cases[29]—a problem which the court is not yet ready to tackle.

Judge Friendly found the appellant's arguments a little more convincing and wrote a vigorous dissent. He had previously warned against the use of hearsay evidence in such circumstances in his decision in *United States v. Borelli,*[30] where he said:

> The government ought not to be allowed, by having its principal witness speak to the grand jury through the voice of another, to deprive a defendant of his right to impeach by contradiction.[31]

Judge Friendly also based his dissent on *Costello,* but distinguished the two cases by their peculiar circumstances. In the *Costello* case, he reasoned, there was an excellent reason for limiting the presentation before the grand jury to summary;[32] but,

[25] In this respect also, see United States v. Kane, 243 F. Supp. 746 (S.D.N.Y. 1965) where the appellant claimed that the practices of prosecuting attorneys in the Second Circuit were so unethical as to constitute an "abuse of process."

[26] United States v. Steel, 238 F. Supp. 580 (S.D.N.Y. 1965); see also United States v. Tane, 29 F.R.D. 131 (E.D.N.Y. 1962).

[27] Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940). (Good cause arises when the disclosure of evidence becomes essential to the attainment of justice.)

[28] Dennis v. United States, 384 U.S. 855 (1966).

[29] The court refers us to the authorities cited in the Advisory Committee's Notes. See FED. R. CRIM P. 16. (Proposed Amend.)

[30] 336 F.2d 376 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965).

[31] *Id.* at 391.

[32] The proof of the evidence which was presented in that case by hearsay would have required 141 other witnesses and 368 exhibits at the trial. The agent's lack of direct knowledge must have been apparent.

there is no such reason here, save a "transparently unworthy one." Thus, in voting to dismiss the indictment, he heeded the warning of Justice Burton that: "to hold a person to answer to such an empty indictment . . . robs the fifth amendment of much of its protective value to the private citizen."[33]

The decision of the Second Circuit cannot be said to be against the trend of the recent decisions which have dealt directly with the admissibility of evidence before the grand jury. Relying on the Supreme Court decisions, the federal courts have upheld indictments which were based on incompetent,[34] inadequate,[35] or even false[36] evidence. In two similar narcotics peddling cases, the indictments were upheld even though based solely on hearsay evidence.[37] The sanctity of the grand jury proceedings has not only been strenuously guarded against the attack of evidentiary rules, but there has been a marked tendency for the courts to refuse to dismiss an indictment for any number of reasons. Indictments have been held valid even though there was: adverse preindictment publicity,[38] perjury of a witness,[39] improper impanelling of jurors,[40] delay in the indictment,[41] a disproportionate representation of racial groups as jurors,[42] and when no minutes have been taken.[43] The reasoning of the Eighth Circuit in *West v. United States*[44] is typical:

> From a practical standpoint, since a judge is not presiding, it would be difficult at this point in the litigation to have a final and binding determination of the legality of the offered evidence.[45]

However convincing the decisions purport to be, the tremendous number of appeals based wholly or in part upon allegedly invalid indictments tends to undermine any notion of finality. There are apparently many criminal attorneys who are convinced that the road to appeal via a defective indictment is not closed.

Viewed superficially, the decision of the court is merely an extension of the *Costello* doctrine and it was no doubt meant as such. A closer inspection will illustrate, however, that the court misapplied the rule in this case. Payton is not presenting a mere claim that his indictment was invalid because there was not enough evidence presented to constitute probable cause, but a charge is made that affirmative action by a prosecutor has deprived him of his right to a fair trial. An indictment

[33] *Supra* note 19, at 364.
[34] Huerta v. United States, 322 F.2d 1 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).
[35] United States v. Grasso, 358 F.2d 154 (3d Cir. 1965). See also United States v. Honer, 253 F. Supp. 400 (S.D.N.Y. 1966).
[36] United States v. Della Universita, 298 F.2d 365 (2d Cir. 1961), *cert. denied*, 370 U.S. 950 (1962).
[37] Williams v. United States, 344 F.2d 264 (8th Cir.), *cert. denied*, 382 U.S. 857 (1965); United States v. Heap, 345 F.2d (2d Cir. 1965).
[38] United States v. Osborn, 350 F.2d 497 (6th Cir. 1965), *aff'd on other grounds*, 87 Sup. Ct. 429 (1966). See also Beck v. Washington, 369 U.S. 541 (1962).
[39] Coppedge v. United States, 311 F.2d 128 (D.C. Cir.), *rev'd on other grounds*, 369 U.S. 438 (1962).
[40] United States v. Wallace & Tiernam, Inc., 349 F.2d 222 (D.C. Cir. 1965).
[41] United States v. Sailley, 360 F.2d 699 (4th Cir. 1965).
[42] United States v. American Oil Co., 249 F. Supp. 130 (1966).
[43] United States v. Caruso, 358 F.2d 184 (2d Cir. 1966).
[44] 359 F.2d 50 (8th Cir 1966).
[45] *Id.* at 56.

based exclusively on hearsay evidence will not per se deny an accused any right—the grand jurors, appraised of all the facts and knowing the exact nature of the type of testimony that they are listening to, may feel that this is sufficient to show probable cause. But, such a procedure as used here has the effect of denying the appellant his right to use every available means to prove himself innocent. It is true that an accused's right to impeach testimony by contradiction is not an enunciated constitutional guarantee, but is certainly more than a "rule of access." When such a right is taken away by affirmative action as evidenced in this case, a prejudicial error has been committed—one which the courts may use to quash an indictment.

The *McNabb-Mallory* rule,[46] which allows the courts to act as supervisors of federal criminal procedure, has been specifically held to extend to the supervisory power over grand jury proceedings.[47] The use of such power would allow the courts to protect the rights of the accused at the level of the grand jury proceeding, an important pre-trial level. This result would seem to be dictated by the recent Supreme Court decisions protecting the rights of the individual before trial. With the realization that our adversary system begins immediately upon the arrest, the decisions of the Court in *Escobedo v. Illinois*[48] and *Miranda v. Arizona*[49] can be viewed as controlling in the present situation. If this "complete" protection is to be our goal, then it would seem that the time has come for the courts to lift the traditional veil of secrecy from the grand jury proceedings and exercise their supervisory power over such proceedings.

The decision in *Payton,* then, if it is what it purports to be, an extension of the *Costello* doctrine, is an unwarranted and illogical one: unwarranted because it goes against the historical function of the grand jury as a vanguard of individual rights; illogical because it is contrary to the recent trend toward insuring individual rights at all stages of the criminal procedure.

[46] McNabb v. United States, 318 U.S. 332 (1943): Mallory v. United States, 354 U.S. 449 (1957).
[47] *In re* Grand Jury Subpoena to Central States, 225 F. Supp. 923 (N.D. Ill. 1964).
[48] 378 U.S. 478 (1964).
[49] 384 U.S. 436 (1966).

Federal Courts—Ancillary Claims and Pendent Jurisdiction—*Wilson v. American Chain & Cable Co.,* 364 F.2d 558 (3d Cir. 1966).

ROBERT WILSON WAS MOWING HIS LAWN with a power mower manufactured by defendant. When Wilson left the machine for a moment his five year old son climbed aboard, fell off, and was seriously injured when the blade struck his foot. Robert Wilson, as guardian of his son and in his own behalf, brought this action against American Chain for negligence. In the lower court judgment was rendered on a jury verdict in favor of the defendant as to the minor's cause of action, and the father's

claim was dismissed for want of the jurisdictional amount.[1] In the Third Circuit the judgment against the minor son was reversed on an error in the instruction to the jury.[2] Dismissal of the father's action was reversed on the grounds that the father's claim was ancillary to the son's, and therefore, the doctrine of pendent jurisdiction was applicable and as long as the son's claim exceeded $10,000 it was not necessary that the father's claim exceed that jurisdictional amount.[3]

In basing its reversal of the dismissal of the father's action on the grounds above stated, the court acted sua sponte. It relied primarily on a Pennsylvania rule of civil procedure[4] which requires that where parent and child or husband and wife are asserting claims arising out of the same incident "the two rights of action shall be redressed in only one suit, brought in the names of the parent and child [or husband and wife]."[5] The court reasoned that since the father's damages flowed to him from the injury suffered by the son, the father's claim was ancillary to the son's.[6] In view of the Pennsylvania rule and the determination that the father's claim was ancillary to the son's, the court concluded that the doctrine of pendent jurisdiction should be applied, so that the father's claim, not otherwise cognizable in the federal courts, should be carried by the son's action into the federal court for adjudication.[7] The son's action was based on diversity of citizenship and damages claimed in excess of $10,000.

In holding that Robert Wilson's claim was ancillary to his son's, the Third Circuit has given new meaning to that term. While it is true that "[w]hen a federal court has jurisdiction over the main cause of action, it also has jurisdiction over any proceedings ancillary to that action, regardless of the amount of money involved, the citizenship of the parties, or the existence of a federal question in the ancillary suit . . . ,"[8] the cases which hold proceedings to be ancillary are not similar to the instant case. The term ancillary is typically employed to describe proceedings to effectuate federal judgments or decrees,[9] for example, in a bankruptcy proceeding, to enjoin the prosecution of suits against the debtor in other forums;[10] or where the court has rendered a decree in a class suit, to restrain any member of the class represented in the federal action, and bound by the court's decree, from relitigating in a state court the issues settled by the federal decree.[11] Where property is in the custody of a federal court, actions to determine rights in that property are said to be ancillary and independent jurisdictional grounds are not required.[12]

The doctrine of ancillary jurisdiction also has been held to apply to both com-

[1] Wilson v. American Chain & Cable Co., 216 F. Supp. 32 (E.D. Pa. 1963).
[2] Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966).
[3] *Id.* at 564.
[4] PENN. R. CIV. 2228.
[5] Rule 2228 (a) refers to actions by a husband and wife. Rule 2228 (b) refers to actions by a parent and child.
[6] Wilson v. American Chain & Cable Co., *supra* note 2, at 564.
[7] *Ibid.*
[8] 1 MOORE, FEDERAL PRACTICE ¶0.90[3], at 822 (2d ed. 1964).
[9] Jones v. Nat'l Bank of Commerce, 157 F.2d 214, 215 (8th Cir. 1946).
[10] Jacksonville Blow Pipe Co. v. Reconstruction Fin. Co., 244 F.2d 394 (5th Cir. 1957).
[11] Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).
[12] Aetna Ins. Co. v. Chicago, R.I. & P. Ry., 229 F.2d 584 (10th Cir. 1956).

pulsory counterclaims and crossclaims. In *United Artists Corp. v. Masterpiece Productions Inc.*[13] jurisdiction of plaintiff's claim was based on a federal question, copyright infringement. Defendant's counterclaim alleged unfair trade practices and conspiratorial activities by plaintiff and others. Some of the other parties brought in on defendant's counterclaim were of the same state as defendant. It was held that the counterclaim was compulsory and therefore ancillary to the original claim. Separate jurisdictional basis for the counterclaim did not have to be shown as to either the original party plaintiff or the third party defendants.[14] In *Dery* v. *Wyer*[15] the action was against a railroad under the Federal Employers' Liability Act. The railroad impleaded a lumber company under Rule 14 of the Federal Rules. There was no diversity between the railroad and the lumber company. The judgment of the lower court held that each defendant must contribute equally to the settlement. The railroad appealed claiming the right to full indemnity. Despite lack of diversity between the railroad and the lumber company, the court decided the issue presented, holding that the railroad's claim against the lumber company was ancillary to the original claim. The ancillary jurisdiction attached when the lumber company was impleaded and it was not lost when the original action was settled. It was not necessary for the railroad's claim to meet the jurisdictional requirements.[16]

The Third Circuit Court of Appeals has stretched the doctrine of pendent jurisdiction to make it applicable in the instant case. As the court pointed out, the usual case of pendent jurisdiction involves only one plaintiff and, as the court failed to point out, two claims, one based on federal law and the other on state or common law.[17] In *Hurn v. Oursler,*[18] a leading case on pendent jurisdiction, the plaintiff joined a copyright infringement claim based on federal law with an unfair business practices claim based on state law. The Supreme Court held that the latter should not have been dismissed since the copyright issue was decided on the merits. The decision was based on the fact that the case involved two distinct grounds for a single cause of action. A different result would be required were there two separate "causes of action only," one being of a federal character.[19] This view was expanded in *United Mine Workers v. Gibbs.*[20] The "two claims, one cause of action" test was discarded in favor of a less technical approach. Gibbs sued the union under §303 of the National Labor Relations Act for violation of a prohibition against secondary boycotts. Gibbs also sued under the common law of Tennessee, alleging that the union conspired to, and did, interfere with his performance of certain contracts. In holding that the doctrine of pendent jurisdiction was applicable to give the federal courts power to hear the claim based on federal law, the Supreme Court established what

[13] 221 F.2d 213 (2d Cir. 1955).
[14] *Id.* at 217.
[15] 265 F.2d 804 (2d Cir. 1959). See also Ortman v. Stanray Corp., 35 U.S.L. WEEK 2425 (Jan. 3, 1967).
[16] *Id.* at 807.
[17] Annot., 5 A.L.R.3d 1047 (1966).
[18] 289 U.S. 238 (1933).
[19] *Id.* at 245.
[20] 383 U.S. 715 (1966).

must be considered a new test for the application of the doctrine of pendent jurisdiction:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a substantial federal claim and the relationship between it and the asserted state claim permits the conclusion that the entire action before the court comprises one constitutional case . . . [I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.[21]

Clearly this broadens the *Hurn v. Oursler*[22] concept of pendent jurisdiction, but even more clearly, it does not alter the essential meaning of the term. There still must be a substantial *federal* claim, a claim based on state law which arises from the same general circumstances as those surrounding the federal claim, and both claims must be asserted by a *single* plaintiff. The term pendent jurisdiction continues to be used to describe a federal court's ability to decide a *non-federal* claim which arises out of the same occurrence as gives rise to the federal question claim.

Despite the arguments advanced by the court that the instant case involves a question of an ancillary claim and pendent jurisdiction, what the court has actually seen fit to countenance is the aggregation of separate claims by several plaintiffs so as to permit one of them to have his case decided in a federal court, when such court would not otherwise take cognizance of the case for want of jurisdictional amount.[23] It is well settled that unless claims are of a joint nature,[24] separate plaintiffs cannot aggregate their claims so as to acquire the jurisdictional amount.[25] In *Payne v. State Farm Mut. Automobile Ins. Co.*[26] the facts were similar to those in *American Chain.* A father was suing in behalf of his minor son and in his own right. It was held that each claim must satisfy the requirement of jurisdictional amount. The same result was reached in *DelSesto v. Trans World Airlines.*[27] In *American Chain* these cases were dismissed merely as being "not here applicable."[28]

The only apparent reason why cases holding against the aggregation of claims would not be applicable would be that the jurisdictions where those cases were de-

[21] *Id.* at 725.

[22] Hurn v. Oursler, *supra* note 18.

[23] In *American Chain* the claim of the minor son did exceed the jurisdictional amount of $10,000, but the father's claim did not. Therefore, there was at least one claim rightfully before the court to which the ancillary claim could attach. But this would be no less a question of aggregation of claims than if the son's claim were to be for $6,000 and the father's claim for $5,000. In both situations the father's claim would be wanting the jurisdictional amount. Query whether the court would be willing to apply the rule of *American Chain* to a case where neither party's claim met the jurisdictional requirement?

[24] Claims or causes of action are said to be joint where there is a single question of law and fact common to all the complaints, as where in a suit to quiet title, the parties claim separate parcels of land under a common source of title. See Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150 (S.D. Fla. 1922).

[25] For a collection of cases see 5 A.L.R.3d 1048; see note, *Multi-party Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1957).

[26] 266 F.2d 63 (5th Cir. 1959).

[27] 201 F. Supp. 879 (D.R.I. 1962).

[28] Wilson v. American Chain & Cable Co., *supra* note 2, at 564.

cided did not have any rule of procedure comparable to the Pennsylvania rule here considered.[29] The rule of procedure was formerly a statute, in effect since 1897.[30] Until 1964 the federal courts of Pennsylvania held that it could not be relied upon to confer jurisdiction on a federal court to hear a claim that did not separately meet the jurisdictional requirements. In *Anicola v. J.C. Penney*[31] the action was by a wife for injuries and by her husband for loss of consortium. The district court held that the Pennsylvania rule did not merge the rights of action of the husband and wife. The rule was termed purely procedural so as to allow the claims to be asserted in one action, but the claims were not merged so as to eliminate the requirement that each claim meet the jurisdictional amount.[32] Not until *Borror v. Sharon Steel Co.*,[33] decided in 1964, was a different result approached. That case involved a wrongful death action and a survival action. Rule 213 (e) of the Pennsylvania Rules of Civil Procedure provides that such actions may be enforced in a single action.[34] The court held that the actions may be considered ancillary or pendent to one another and it was therefore unnecessary that there be diversity of citizenship between the party suing in behalf of the decedent in the survival action and the defendant.[35] This view was developed further in *Morris v. Gimbel Bros.*[36] The action was by the wife for injuries and by the husband for loss of consortium. A motion to dismiss the husband's action was denied although it was conceded that there was not the remotest possibility that he could get a verdict for $10,000, or if he did, that it could stand. The husband's claim was held pendent to his wife's, and this cured the jurisdictional defect.[37] The decision in *American Chain* completes the development of the trend. In effect, this trend gives certain rules of the Pennsylvania Rules of Civil Procedure the weight of substantive law, and makes them controlling over the Federal Rules.

The result reached by the Court of Appeals for the Third Circuit in the instant case is a desirable one in many respects. It is clearly a result which would be reached were a state court of Pennsylvania deciding the matter. It thus promotes uniformity of result within the jurisdiction and thereby gives effect to the rationale behind *Erie v. Tomkins*.[38] Furthermore, it results in judicial economy—the parties are given the opportunity of litigating all claims arising from a single occurrence in a single proceeding.

But such a decision, arising from the court's own motion, to confer jurisdiction upon a federal court to hear a claim which otherwise it could not hear, should be questioned. For it must be realized that the court has resorted to judicial legerdemain to give respectability to what can only be viewed as an enlargement of the Federal

[29] PENN. R. CIV. P. 2228.
[30] Act of May 12, 1897, P.L.62 § 1 (parent and child); Act of May 8, 1895, P.L. 54, § 1 (husband and wife).
[31] 98 F. Supp. 911 (E.D. Pa. 1951).
[32] *Id.* at 912.
[33] 327 F.2d 165 (3d Cir. 1964).
[34] PENN. R. CIV. P. 213 (e).
[35] Borror v. Sharon Steel Co., *supra* note 33.
[36] 246 F. Supp. 984 (E.D. Pa. 1965).
[37] *Ibid.*
[38] 304 U.S. 64 (1938).

Rules. The court's reliance upon the terms "ancillary" and "pendent" to justify its decision would seem to obscure their meanings. For the sake of semantics it would have been better had the court not resorted to these words to describe what it did. But the court can label its activities with any terms it desires. What it actually does is what deserves examination and evaluation. And what it has done is create an anomalous procedure, whereby, in Pennsylvania, in limited types of cases, a party can sue another party in a federal court without meeting the jurisdictional requirements as set forth in 28 U.S.C. § 1332 (1964). The Federal Rules of Civil Procedure are not infallible but they are generally comprehensive and set out to a considerable extent and in adequate detail the types of actions which may be joined with others in the interest of judicial economy.[39] For the sake of uniformity within the federal system, perhaps it would be preferable to add to the federal rules by amendment, after due consideration, rather than by scattered, hastily reached decisions.

[39] Rule 20(a) of the Federal Rules of Civil Procedure provides for joinder of plaintiffs where the parties joining their actions assert a right arising out of the same transaction or occurrence. Under this rule, for parties to join, each party must be able to meet the jurisdictional requirements. Aggregation of claims is not permitted. See 1 MOORE, FEDERAL PRACTICE ¶0.97, at 882 (2d ed. 1964). It is submitted that this rule should be controlling over state rules of procedure in the federal courts.

Spendthrift Trusts—Creditors—
Utley v. Graves, 258 F. Supp. 959 (D.D.C. 1966).

ON APRIL 11, 1962, Olga Graves died testate. Under her will the testatrix created a spendthrift trust in which her husband, the defendant, was given the income for life. Subsequently, defendant elected to take under the will, thus foregoing his statutory share.[1] On April 22, 1966, the plaintiff, Freda Utley, obtained a default judgment against the defendant. Shortly thereafter she instituted a garnishment proceeding against the American Security and Trust Company, the trustee under the will, in order to reach the defendant's interest in the trust fund. The district court reasoned that since the defendant elected to take under the will, thus requiring him to relin-

[1] D. C. CODE ANN. § 19-113(a) (Supp. V, 1966):
Subject to section 19-114, a surviving spouse is, by a devise or bequest . . . barred of any statutory rights or interest he has in the real or personal estate of the deceased spouse or dower rights, as the case may be, unless, within six months after the will of the deceased spouse is admitted to probate, he files in the Probate Court a written renunciation. . . .
D. C. CODE ANN. § 19-114 (Supp. V, 1966):
A surviving spouse who does not renounce as provided by section 19-113 is entitled to the benefit of all provisions in his favor in the will of the deceased spouse. . . .

quish his statutory rights, he had, in effect, purchased[2] the spendthrift trust and therefore could not avail himself of the spendthrift provisions.[3]

A spendthrift trust is an express trust in which the interest of the cestui que trust cannot be assigned by him or reached by his creditors.[4] The underlying purpose of the settlor in creating such a trust is to insulate the trust from the cestui que's own imprudence or indiscretion in business transactions. The overriding public policy of this rationale is that the trust is a free and voluntary gift from the settlor, who has a right to dispose of his property, while imposing such conditions and limitations as he chooses; the creditors of the beneficiary are not defrauded, since the gift is something that the beneficiary would not have had, had it not been for the generosity of the settlor.[5] The doctrine of spendthrift trusts has been accepted by a majority of the jurisdictions in the United States,[6] and the validity of spendthrift trusts in the District of Columbia has been recognized for many years.[7]

An exception is made to the general rule sustaining the validity of spendthrift trusts, when the settlor either creates the spendthrift trust for himself[8] or purchases the rights of a spendthrift trust from another.[9] In either case the beneficiary is the settlor of the trust. The reason for not allowing the trust in these cases is that it is contrary to public policy for a man to place his assets in a trust, which provides him with a steady income, while it prevents his creditors from reaching the trust.[10]

In *Utley*[11] the district court relied upon the rationale expressed in *Bank of Commerce v. Chambers*.[12] There, a testamentary spendthrift trust was created by the

[2] Purchase is defined as the furnishing of consideration for the creation of the trust. *Infra* note 9.

[3] Utley v. Graves, 258 F. Supp. 959 (D.D.C. 1966).

[4] RESTATEMENT (SECOND), TRUSTS § 152 (2) (1959).

[5] Nichols v. Eaton, 91 U.S. 716, 726-27 (1875). See BOGERT, TRUSTS & TRUSTEES § 222 (2d ed. 1965); 2 SCOTT, TRUSTS § 152 (2d ed. 1956).

[6] There are twenty-four jurisdictions where the spendthrift trust is valid as to both the income and the principal; of these, six jurisdictions (Ala., Cal., Conn., Minn., Okla., Va.) have statutes which allow the creditors to reach the surplus above a specified limit. In seventeen jurisdictions the trust is valid only as to the income; ten jurisdictions (La., Mich., Miss., Mont., N.J., N.Y., N.C., N.D., S.D., Wis.) by statute allow the creditors to reach the excess above a certain limit. There are no decisions in six jurisdictions, and spendthrift trusts are held invalid in four (Ky., N.H., Ohio, R.I.). See generally LORING, A TRUSTEE'S HANDBOOK 380-86 (6th ed. Farr rev. 1962); GRISWOLD, SPENDTHRIFT TRUSTS §§ 150-236 (2d ed. 1947); Annot., 34 A.L.R.2d 1335, 1347-60 (1954).

[7] Shelton v. King, 229 U.S. 90 (1913); Fearson v. Dunlop, 21 D.C. (Tuck. & Cl.) 236 (1892); Morrow v. Apple, 26 F.2d 543 (D.C. Cir. 1928); Ridgeway v. Woodward, 78 F.2d 878 (D.C. Cir.), *cert. denied*, 296 U.S. 575 (1935); Seidenberg v. Seidenberg, 126 F. Supp. 19 (1954), *aff'd*, 225 F.2d 545 (D.C. Cir. 1955).

[8] 2 SCOTT, TRUSTS § 156, at 1092-93 (2d ed. 1956). *Cf.* Liberty Nat'l Bank v. Hicks, 173 F.2d 631 (D.C. Cir. 1949).

[9] 2 SCOTT, *op. cit. supra* note 8, § 156.3, at 1103:

> A person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another person.

For example, A creates a trust for B in consideration for B's paying a certain sum to A. The beneficiary, B, is in substance purchasing the trust for himself.

[10] See RESTATEMENT (SECOND), TRUSTS § 156 (1959); 2 SCOTT, *op. cit. supra* note 8; BOGERT, *op. cit. supra* note 5, § 223.

[11] Utley v. Graves, *supra* note 3, at 961.

[12] 96 Mo. 459, 10 S.W. 38 (1888).

beneficiary's deceased wife. An express provision in the will required that the husband release his estate by curtesy in order to avail himself of the trust. After electing to receive under the will, the husband's creditors attempted to subject the trust to an attachment. The court stated that spendthrift trusts are valid so long as the beneficiary does not part with something in return for the trust. However, the husband, in parting with his curtesy right, assumed the attitude of a purchaser, and as such the income from the trust was subject to his creditors' claims.[13]

The result of the *Chambers* case was followed in *Re Qua v. Graham*.[14] In the latter case the husband received an annual annuity from his wife's will. The immunity of the annuity from execution of creditors depended upon an Illinois statute, which was only applicable when the trust was created by a person other than the beneficiary. The court characterized the annuity provision as an offer by the wife to purchase the husband's interest in her estate. The consideration given by the husband was the relinquishment of his curtesy interest. The husband, then, held the annuity as a purchaser and not as the object of his wife's bounty, and for this reason the annuity could be reached by the creditors.[15]

In the District of Columbia the surviving spouse must renounce all gifts made to him by the will of the deceased spouse, in order to claim his statutory share; a written renunciation must be filed promptly in the Probate Court.[16] Judge Holtzoff in *Utley* stated that a surrender of the husband's statutory share in his wife's estate is an exchange for the benefits of the will, *i.e.*, the spendthrift trust provisions.

> The result is that the spendthrift trust under such circumstances is not a free and voluntary gift on the part of the testator or testatrix. *The surviving spouse gives a consideration for receiving the benefits of the trust by surrendering his or her statutory rights* .... Being a purchaser and in the same position as though he were the creator of the trust, the provisions surrounding the fund with immunity from claims of creditors, become void.[17] (Emphasis added.)

The act of purchase in the *Chambers*[18] case was the surrender by the husband of his curtesy estate. At common law by curtesy, the husband acquired an inter vivos interest, rather than testamentary interest, in his wife's real property.[19] The interest of the husband evolved into a present life estate, if his wife predeceased him.[20] In

[13] But for [the husband's] compliance with the express condition in the will, by the surrender of his curtesy in his wife's estate by deed . . . the income provided for his use would never have become his.
Id. at 466, 10 S. W. at 41.

[14] 187 Ill. 67, 58 N.E. 357 (1900). See also Miners Bank of Wilkes-Barre v. Weitzenkorn, 32 Luz. Leg. Reg. 129 (Pa. 1938). *But see* Merchants Nat'l Bank v. Crist, 140 Iowa 308, 118 N.W. 394 (1908). Compare Fleming's Estate, 219 Pa. 422, 68 Atl. 960 (1908); Weller v. Noffsinger, 57 Neb. 455, 77 N.W. 1075 (1899).

[15] "By failing to decline to take under the will [the husband] relinquished his rights to his share of her estate given him by law, and with such interest purchased the annuity. . . ." Re Qua v. Graham, *supra* note 14, at 70, 58 N.E. at 358.

[16] D. C. CODE ANN. § 19-113 (a) (Supp. V, 1966), *supra* note 1.

[17] Utley v. Graves, *supra* note 3, at 961.

[18] Bank of Commerce v. Chambers, *supra* note 12.

[19] 1 AMERICAN LAW OF PROPERTY §§ 5.57, 5.65 (Casner ed. 1952).

[20] Prior to the Married Women's Acts of the nineteenth century, the husband had a present estate in his wife's lands as soon as a child was born. Subsequent to these Acts, the

Chambers the husband's right had become possessory upon his wife's death, *i.e.*, before he elected to receive under the will. In such a situation, when the husband relinquished his estate in order to acquire the spendthrift trust under the will, he was in fact purchasing the trust.

The *Re Qua*[21] case does not articulate whether the husband was entitled to an estate by curtesy, or merely a distributive share of his wife's estate. Because of the reliance upon *Chambers* and similar cases relating to dower, it would seem that the court's reasoning was based on the former.

However, in *Utley*[22] the defendant had no possessory interest in the estate prior to his election. He had an option of claiming either: 1) statutory dower in all real property in which it had attached, or 2) a share in all the realty owned by his wife at the time of her death. Regardless of which interest the defendant claimed in his wife's real property, he was also entitled to a share of her personal property.[23] Therefore, when the defendant elected to receive under the will and forego his statutory share, he was not relinquishing any possessory interest in the property, as in *Chambers*,[24] but rather choosing between two alternative rights.

The result reached in the *Utley*[25] case is contrary to the views expressed by the American Law Institute[26] and Professor Scott[27] in his treatise on trusts. Their rationale is premised on acceptance of spendthrift trusts per se.

> If spendthrift trusts are to be permitted at all, it would seem that a husband should be allowed to create [a spendthrift] trust for his widow, even though she may have power to refuse to accept the provisions of his will and take her dower or distributive share in lieu thereof.[28]

As is evidenced by the opinion in *Utley*, the objection is not to the wife's creation of the testamentary trust, but rather to the rationale of spendthrift trusts in general.

Judge Holtzoff had shown his dislike for spendthrift trusts previously in *Seidenberg v. Seidenberg*.[29] A more frontal attack was used in *Utley*,[30] when the spendthrift trust was called, *inter alia*, "an anomaly and an anachronism." A valid objection can be proffered that it is inequitable for a person to incur pecuniary obligations, while at the same time being shielded from any legal liability. Although the more

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husband had a protected expectancy, similar to inchoate dower. 1 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 19.

[21] Re Qua v. Graham, *supra* note 14.

[22] Utley v. Graves, *supra* note 3.

[23] MERSCH, PROBATE COURT PRACTICE IN THE DISTRICT OF COLUMBIA § 322 (Supp. 1966).

[24] Bank of Commerce v. Chambers, *supra* note 12.

[25] Utley v. Graves, *supra* note 3.

[26] RESTATEMENT (SECOND), TRUSTS § 156, comment f (1959):
Where a trust is created by the will of one spouse in favor of the other, the surviving spouse does not become the settlor of the trust merely because she or he waives a right to insist on dower or curtesy or a statutory distributive share of the estate of the deceased spouse.

[27] 2 SCOTT, *op. cit. supra* note 8, § 156.3.

[28] *Id.* at 1106.

[29] 126 F. Supp. 19 (1954), *aff'd*, 225 F.2d 545 (D.C. Cir. 1955).

[30] Utley v. Graves, *supra* note 3, at 960.

sophisticated businesses might be cognizant of the beneficiary's credit standing, the smaller businesses are more likely to suffer, since they have no facility for an extentive credit check.[31]

These were the objections raised when the doctrine of spendthrift trusts was first initiated in the United States in 1875.[32] The *raison d'etre* has overcome this obstacle, as is manifest by the overwhelming acceptance of the doctrine.[33] Once the determination is made to recognize the trust's validity, an exception as is made in the *Utley* case, cannot be justified. It seems anomalous that the election statute,[34] which was designed to protect the surviving spouse, could be rotated by such a procedure that it would prevent a husband from giving the same security to his spouse that he can give to a stranger.

If the position adopted by *Utley* is affirmed, the result would be that neither a husband nor a wife would be able to create a valid testamentary spendthrift trust for the benefit of the surviving spouse. Such a result would be viewed with disfavor, if the acceptability of the doctrine of spendthrift trusts is to continue in the District of Columbia.[35]

[31] Seidenberg v. Seidenberg, *supra* note 29, at 21; Utley v. Graves, *supra* note 3, at 960.
[32] Nichols v. Eaton, *supra* note 5.
[33] *Supra* note 6.
[34] D. C. CODE ANN. § 19-113(a) (Supp. V, 1966), *supra* note 1.
[35] American Security & Trust Co. v. Utley, *appeal docketed,* No. 20589, D.C. Cir., Nov. 28, 1966.

Torts—Federal Employers' Liability Act—Failure to Provide Seat Belts in Motor Vehicles—*Mortensen v. Southern Pac. R.R.,* 245 Cal. App. 2d 248, 53 Cal. Rptr. 851 (1966).

PLAINTIFF'S INTESTATE, who was an employee of defendant railroad company, was driving a pickup truck on the freeway while taking two engineers to inspect bridges along defendant's rail lines when the truck was struck from the rear by an automobile driven by a third party who was intoxicated.[1] The truck went off the road; intestate was thrown out of the truck which then rolled over him and he died an

[1] Mortensen v. Southern Pac. R.R., 245 Cal. App. 2d 248, 249, 53 Cal. Rptr. 851, 852 (1966). *Cf.* Inman v. Baltimore & Ohio R.R., 361 U.S. 138 (1959).

hour later as a result of severe brain damage. Plaintiff brought this action under the Federal Employers' Liability Act[2] alleging that the railroad was negligent in failing to provide intestate with a seat belt in the truck and that this was the proximate cause of death. At the close of plaintiff's case the trial judge granted defendant's motion for nonsuit[3] and dismissed the jury. On appeal the district court of appeal *held*: the question of negligence in failing to equip its motor vehicles with seat belts was for jury determination.[4]

There have been a number of cases arising under FELA in which the plaintiff has specifically charged the defendant railroad with negligence for failure to provide particular individual safety equipment.[5] The act provides that a railroad is liable for injury to or death of an employee "resulting in whole or in part . . . by reason of any defect or insufficiency, due to its negligence, in its . . . appliances . . . or other equipment."[6] However, in only one case did the court discuss the question whether an item of individual safety equipment was an "appliance" or piece of "other equipment" within the meaning of that provision.[7] Decisions in the other cases are generally based on some combination of the following common law tort rules:[8] a railroad employer has a duty to exercise reasonable care[9] for the safety of its employees commensurate with the circumstances of the particular case,[10] but it is not an insurer of the safety of its employees;[11] its negligence[12] must be the proximate cause of injury

[2] 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1964).

[3] The case was dismissed for failure to state a cause of action.

[4] Mortensen v. Southern Pac. R.R., *supra* note 1.

[5] Annot., 80 A.L.R.2d 836 (1961). There are also many cases arising under FELA in which the plaintiff charged the defendant railroad with negligence for failure to supply some item of safety equipment or with failure to supply adequate safety equipment as prescribed by the Federal Safety Appliances Act, 27 Stat. 531 (1908), 45 U.S.C. §1 (1964); or by the Boiler Inspection Act, 43 Stat. 659 (1924), 45 U.S.C. §22 (1964). The cases discussed in this note do not involve these statutes.

[6] Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. §51 (1964).

[7] Borde v. New Orleans G.N.R.R., 140 So. 810, 814 (La. App. 1932).

> [T]he word "appliances" employed in that act [FELA], as we understand it, has reference to the adjusting of something to the engine, roadbed, or track etc., mentioned in the statute. The further provision therein made says: "Or other equipment." The word "other" preceding "equipment" has reference to some apparatus in character corresponding in nature or kind to the things mentioned in the act.

The court then applied this rule to the case before it in which a railroad employee charged his employer with negligence for failure to provide him with goggles. "We do not think that the statute intended to embrace in the words 'appliances' and 'equipment' goggles for the use of the employees of railroad companies."

[8] McGivern v. Northern Pac. Ry., 132 F.2d 213, 217 (8th Cir. 1942). "The common law rules for determining negligence on the part of an employer towards his employee are controlling on the question as to what constitutes negligence within the meaning of the Federal Employers' Liability Act, unless by the terms of the Act common law rules are abrogated."

[9] Atlantic Coast Line R.R. v. Craven, 185 F.2d 176 (4th Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).

[10] Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957).

[11] Wolfe v. Henwood, 162 F.2d 998 (8th Cir. 1947), *cert. denied*, 332 U.S. 773 (1947).

[12] Delaware, Lackawanna & Western R.R. v. Koske, 279 U.S. 7, 10-11 (1929). "The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence."

or death;[13] it must provide safe places in which to work[14] and safe appliances,[15] but it need not provide the newest or safest places or appliances where those in use are reasonably safe.[16]

In a number of cases it should be noted that the failure to provide some item of safety equipment is not the sole allegation of negligence.[17] The failure to provide safety equipment is often coupled with failure to provide a safe place in which to work. In *Bimberg v. Northern Pac. R.R.*[18] where plaintiff fell from a bridge while repairing track, the alleged grounds for negligence were: failure to provide a safety belt, failure to provide ties of prescribed length, failure to provide a solid floor on which to work, and failure to provide a guard rail.

The majority of the cases deal with three basic items of safety equipment: goggles, respirators and masks, and protective clothing.[19] Other cases charge negligence for failure to provide safety belts[20] or climbing spurs.[21] There is one case in which the railroad is charged with failure to provide a flashlight[22] and one in which it is charged with failure to provide ear plugs.[23] The equipment involved in these cases taken together with the settings in which they are involved are traditional railroading situations.[24] The situation in *Mortensen* is farther removed from this traditional railroad area.[25]

Prior to the 1939 amendment to FELA, recoveries by employees in cases based

[13] Sadowski v. Long Island R.R., 292 N.Y. 448, 55 N.E.2d 497 (1944). The defendant in *Mortensen* contended that the driver of the automobile which hit plaintiff's truck was the sole proximate cause of plaintiff's death; it relied on *Inman v. Baltimore & Ohio R.R.*, *supra* note 1. In that case a railroad employee was injured, while stationed at a railroad crossing, by an automobile operated by an intoxicated driver. No accidents had occurred at the crossing during the years in which it was similarly used, and the Court concluded that such an accident was not reasonably foreseeable. The *Mortensen* court distinguished the two cases stating that it could not be concluded, as a matter of law, that the accident in *Mortensen* was not reasonably foreseeable since it was shown that the number of automobile accidents on the freeway on which this accident occurred, and on the roads of California in general, was considerable.

[14] See Young v. Clinchfield R.R., 288 F.2d 499 (4th Cir. 1961).

[15] Sadowski v. Long Island R.R., *supra* note 13.

[16] Ferrara v. Boston & Maine R.R., 338 Mass. 323, 155 N.E.2d 416 (1959).

[17] See Beard v. Baltimore & Ohio R.R., 243 Ill. App. 537 (1927) (a railroad employee alleged negligence for failure to provide a safety belt, and for failure to provide climbing spurs).

[18] 217 Minn. 187, 14 N.W.2d 410, *cert. denied*, 323 U.S. 752 (1945).

[19] *Supra* note 5.

[20] *E.g.*, Bimberg v. Northern Pac. R.R., *supra* note 18; Hallstein v. Pennsylvania R.R., 30 F.2d 594 (6th Cir. 1929); Beard v. Baltimore & Ohio R.R., *supra* note 17.

[21] *E.g.*, Southern R.R. v. Bradshaw, 73 Ga. App. 438, 37 S.E.2d 150 (1946); Cleveland, C. C. & St. L. R. R. v. Belange, 78 Ind. App. 36, 135 N.E. 367 (1922); Beard v. Baltimore & Ohio R. R., *supra* note 17.

[22] Dolmage v. Chicago, R.I. & P. R. R., 241 Minn. 339, 63 N.W.2d 273 (1954), *cert. denied*, 348 U.S. 822 (1954).

[23] Rubley v. Louisville & Nashville R. R., 208 F. Supp. 798 (E.D. Tenn. 1962).

[24] See Annot., *supra* note 5. Generally, the equipment involved is goggles, masks, or some article of protective clothing; most of the accidents occur on trains, in yards, or on tracks and bridges.

[25] Most of the cases arising under FELA in which a railroad employee is injured or killed by a motor vehicle involve either a railroad crossing or yard as the site of the accident. The

on a failure to provide some item of individual safety equipment were often barred by the railroads' assertion of the defense of assumption of risk.[26] Generally, in the pre-1939 cases charging failure to provide goggles, plaintiff was precluded from recovery on this ground.[27] He usually succeeded only by rebutting this defense by proving that he had requested, but had not received, the goggles prior to the time of injury.[28] The defense was almost equally effective in cases of failure to provide respirators or masks[29] and in cases of failure to provide safety belts.[30] After 1939 assumption of risk was prohibited as a defense[31] so that many plaintiffs were able to get their cases to a jury, while before that time they would have been precluded from recovery as a matter of law.

In *Mortensen v. Southern Pac. R.R.* the court pointed to the fact that death resulted from intestate's leaving the cab of the truck.[32] A physicist and two highway patrolmen of long experience testified that seat belts were effective in reducing casualties and minimizing injuries. It was also shown that an engineer who remained in the truck received "much lesser injuries."[33] Defendant's own safety department had called to the attention of the management the desirability of seat belts and recommended their installment.[34] Only where there would be a complete absence of probative facts to support a jury conclusion would a case be withheld from the jury.[35] The court coupled the "appliances" and "other equipment" provision of FELA with the rule that the test of a safe place to work is "whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger."[36] The defendant contended that it was not negligent in that

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Mortensen accident occurred on a public freeway, removed from the general sphere of railroad activity. See Annot., 99 A.L.R.2d 1186 (1965).

[26] 35 Stat. 65 (1908), 45 U.S.C. § 51 (1964).

[27] *E.g.*, Chesapeake & Ohio R. R. v. Kuhn, 284 U.S. 44 (1931); Louisville & N. R. R. v. Hicks, 49 Ga. App. 846, 176 S.E. 698 (1934).

[28] *E.g.*, Etheridge v. Atlantic Coast Line R. R., 209 N.C. 326, 183 S.E. 539 (1936). *But see* State v. Poolos, 241 N.C. 382, 85 S.E.2d 342 (1955).

[29] See Chicago, R.I. & P.R.R. v. Clark, 175 Okla. 70, 51 P.2d 539 (1935). The court decided the case in favor of defendant railroad primarily on the ground that plaintiff had assumed the risk of injuries, but also added that the railroad had not been shown to be negligent.

[30] See Hallstein v. Pennsylvania R. R., *supra* note 20; Beard v. Baltimore & Ohio R. R., *supra* note 17.

[31] Federal Employers' Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1964).

[32] *Supra* note 1, at 853. "There was testimony that the many fractures suffered by decedent resulted either from the impact of his body on the ground as he was thrown from the pickup, or from the vehicle's having rolled over him after he was ejected."

[33] *Id.* at 853-54. "The employee riding on the right side was also thrown from the car [sic], and sustained injuries which were severe although not fatal. The engineer riding in the center of the seat was not thrown from the car [sic], and sustained much lesser injuries."

[34] *Id.* at 853.

[35] Lavender v. Kurn, 327 U.S. 645, 653 (1946).

[36] Atlantic Coast Line R. R. v. Craven, *supra* note 9. The *Mortensen* court pointed out, with respect to the likelihood of injury: "Here, we deal with the general likelihood of automobile collisions upon the highway, not with the peculiar causation [*i.e.*, the intoxicated driver] of the particular collision which gives relevance to the need for seat belt protection. . . ." *Supra* note 1, at 252, 53 Cal. Rptr. at 854.

a California statute[37] requiring seat belts in new vehicles was not in effect at the time of the accident,[38] and that bus and taxi cab companies had not installed seat belts. Both of these contentions were ruled inconclusive, but the court did take notice of the fact that seat belt anchors were required by statute[39] at the time of the accident.[40]

The most significant trend in the modern cases applies generally to all cases arising under FELA as well as the safety equipment cases in particular. Since the decision of the United States Supreme Court in the case of *Rogers v. Missouri Pacific R. R.*[41] in 1957, no fewer than 22 cases reverse federal and state decisions and say that the question of negligence is for the jury.[42] During this period there has been only one exception to this trend.[43]

The general practice or custom of railroads is often determinative in these cases. It has been held in several cases that where it is a wide railroad practice not to provide a certain type of safety equipment, it may still be found by the jury that a defendant railroad was negligent in not providing it in a particular case.[44] This will be the case where "prevalent standards of conduct are inadequate to protect"[45] its employees. In other cases, however, the general practice of railroads has been sufficient to bar recovery by a plaintiff.[46] These cases are distinguished by the fact that the prevalent practice has been in effect with little incident for some period of time. Thus, where a signal maintainer was injured while climbing down a tree when his "pole spikes" became clogged with bark and slipped out of the tree, he alleged negligence on the part of the railroad for not furnishing him with "tree spikes" which are longer. Plaintiff did not recover as the evidence showed that "pole spikes" had been cus-

[37] CAL. VEHICLE CODE §27309 (West Supp. 1966).

On and after January 1, 1964, no person shall sell or offer for sale any new passenger vehicle, other than a motorcycle, which is not equipped with at least two safety belts or safety belt-shoulder harness combinations of a type approved by the department which are installed for the use of persons in the front seat of the vehicle.

This section only applies to a retail sale of, or an offer to sell at retail, a new passenger vehicle.

[38] The California statute became effective on January 1, 1964; the accident occurred on October 17, 1962.

[39] CAL. VEHICLE CODE §27303 (West Supp. 1966).

On and after January 1, 1962, no person shall sell any new passenger vehicle, other than a motorcycle, manufactured after January 1, 1962, which is not equipped with anchors or other devices meeting the specifications established by the department, to which safety belts or safety harnesses may be attached and secured for at least two passengers in the front seat.

Such anchors or other devices shall be capable of withstanding a belt assembly load of 5,000 pounds.

[40] The California statute became effective on January 1, 1962; the accident occurred on October 17, 1962.

[41] 352 U.S. 500 (1957).

[42] See Barrett v. Toledo, Peoria & Western R. R., 334 F.2d 803, 804 (7th Cir. 1964); Harris v. Chesapeake & Ohio R. R., 358 F.2d 11, 13 (7th Cir. 1966).

[43] Inman v. Baltimore & Ohio R. R., *supra* note 1.

[44] Urie v. Thompson, 337 U.S. 163 (1949).

[45] *Id.* at 178 states that FELA liability attaches if defendant knew, or in the exercise of due care should have known ". . . that prevalent standards of conduct were inadequate to protect" its employees.

[46] *E.g.*, Southern R. R. v. Bradshaw, *supra* note 21.

tomarily furnished to, and satisfactorily used by, signal maintainers for a number of years and were reasonably safe and suitable for such use.[47] In *Mortensen* the court held that defendant's evidence showing that a bus company and a taxi company did not equip their vehicles with seat belts was not conclusive and adopted the rule laid down in *Urie v. Thompson*.[48] The introduction of this evidence takes the case into the common law area and away from the sphere of FELA.

The application of state statutes in actions under FELA is irregular.[49] The act states "that no . . . employee . . . shall be held to have been guilty of contributory negligence in any case where the violation by [a] common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."[50] In *St. Louis, I.M. & S.R.R. v. McNamare*,[51] the court said that a state statute requiring railroads to block or fill switches, frogs and guard rails was applicable as it did not conflict with the federal act. Where an employee charged negligence for a railroad's failure to have a headlight on its engine, defendant was not relieved of liability by a statute which permitted such an engine to continue to its destination without a headlight.[52] A state statute giving railroad companies the right to cut down trees which may be in danger of falling on a road was not superseded by FELA.[53] Violation of another statute imposing a duty on railroads to block unused switch tracks, for the benefit of its employees, was actionable negligence.[54] But a state statute requiring land owners to destroy noxious weeds on properties and railroad rights of way was held inapplicable.[55] The *Mortensen* court nowhere indicated that the seat belt statute[56] would not have been applicable had it been in effect at the time of the accident. By noting the statute[57] requiring anchors for seat belts, the court intimated that the seat belt statute may have been applicable.

The effect of the *Mortensen* case insofar as it bears on the question of seat belt negligence may be considerable both within the range of FELA and in the common law tort field as well.[58] The case is a logical application and extension of the safety

[47] *Ibid.*

[48] *Supra* note 44.

[49] The general criterion for applying or not applying state statutes in FELA cases appears to be whether or not the statute conflicts with the federal act. Most cases dealing with the applicability of state statutes in an FELA action involve a state workmen's compensation statute; these statutes are generally held to be inapplicable for the reason that they do conflict with the federal act.

[50] Federal Employers' Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. § 53 (1964).

[51] 91 Ark. 515, 122 S.W. 102 (1909).

[52] Salabrin v. Ann Arbor R. R., 194 Mich. 458, 160 N.W. 552 (1916).

[53] O'Conner v. Chicago, M. & St. P. Ry., 163 Wis. 653, 158 N.W. 343 (1916).

[54] Luton Mining Co. v. Louisville & N. R. R., 276 Ky. 321, 123 S.W.2d 1055 (1938).

[55] Lawrence v. Rutland R. R., 112 Vt. 523, 28 A.2d 488 (1942), *cert. denied*, 317 U.S. 693 (1943).

[56] *Supra* note 37.

[57] *Supra* note 39.

[58] There are three other cases involving the question of seat belt negligence, none of which arose under FELA. The case of Kapp v. Sulivan, 234 Ark. 395, 353 S.W.2d 5 (1962), involved a products liability suit against the manufacturer, seller, and installer of an automobile seat belt which tore during collision; plaintiff alleged that this was the cause of her injuries.

equipment cases. Also it is conceivable that, in the absence of a federal statute,[59] state statutes requiring seat belts will be admissable evidence or even controlling on a railroad's liability. These statutes do not seem to conflict with the act, and support a strong public consciousness concerning the serious problem of traffic injuries and deaths. *Mortensen* also demonstrates that the failure to provide seat belts in a motor vehicle may constitute negligence based on common law tort rules. Because of this, it may become authority for similar cases arising in the master-servant field of torts beyond the range of FELA; perhaps its effect will reach to other common law tort actions as well.

A jury returned a verdict for defendant. The verdict was affirmed on appeal, the court saying that it could have been found from the evidence that the force applied to the belt during collision was greater than that which the belt was designed to withstand. However, the court did admit expert testimony on the effectiveness of seat belts during collisions. In *Stockinger v. Dunisch*, a trial court decision in For the Defense, December 1964 p. 79, defendant argued that plaintiff who did not fasten his seat belt had a duty to do so, and that this failure was the cause of plaintiff's injuries which arose out of an automobile collision. It was further argued that a Wisconsin seat belt statute (WIS. STAT. ANN. §347.48 (1963)) similar to the California statute (*supra* note 37) was meaningless unless it imposed a duty upon motorists to fasten their seat belts. Plaintiff's recovery was reduced by ten percent under Wisconsin's comparative negligence statute (WIS. STAT. §331.045 (1961)). A case almost identical to *Stockinger* arose in Indiana in 1965 (Butorac v. Kavanagh, Cause No. S62-7793, Superior Ct. of Marion, Ind., 1965). In that case the Indiana seat belt statute was not in effect at the time of the accident, and the court would not permit the jury to find that the plaintiff was guilty of contributory negligence in not fastening his seat belt. Also the court would not consider public policy with regard to the use of seat belts and their effect. For a discussion of the latter two cases see 38 SO. CAL. L. REV. 733 (1965).

[59] The National Traffic and Motor Vehicle Safety Act (80 Stat. 718) was passed on September 9, 1966. It gave the Secretary of Commerce authority to ". . . establish by order appropriate Federal motor vehicle safety standards." (§103 (a)). The Department of Transportation Act (Public Law 89-670, 80 Stat. 931) established a department of transportation and provided for a Secretary of Transportation. The act provided that ". . . the Secretary [of Transportation] shall carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 . . . through a National Traffic Safety Bureau which he shall establish in the Department of Transportation." (§3 (f) (1)). Recently, the Bureau proposed many safety features which are to be incorporated into motor vehicles among which is this provision: "Seat belts must be installed for each forward-facing passenger seat in an automobile. . . ." The features are to go into effect on January 31, 1967.

The state seat belt statutes will presumably be in effect with regard to motor vehicles produced between the time that a given statute became effective and the time that the federal statute becomes effective. With regard to any further application of the state statutes the National Traffic And Motor Vehicle Safety Act of 1966 provides:

> Sec. 103. (d) Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

For a further discussion of the seat belt statutes see 14 DEPAUL L. REV. 152 (1964).

Torts—Libel Per Quod—Special Damages—*Hinkle v. Alexander,* 417 P.2d 586 (Ore. 1966).

DEFENDANT, THE OPERATOR OF A LODGE, customarily extended credit to loggers if their employers agreed to be responsible for the bills. Plaintiff had no such agreement with defendant, yet defendant extended credit to one of plaintiff's employees. Defendant then tried unsuccessfully to obtain payment from the plaintiff. Consequently, defendant posted in his lodge a statement that one of plaintiff's employees owed a debt. Written across the face of the bill was this statement: "Wayne Hinkle owes this to us." The Supreme Court of Oregon held the defendant liable in an action for libel stating that when one is libelled, he is entitled to collect even though he does not prove special damages.[1] The court thus settled a dispute which has been puzzling Oregon courts since 1928.[2]

The thinking of early English courts was that damage was presumed from any libel.[3] The earliest case in accord with this thinking is a 1679 decision.[4] Other courts followed suit,[5] and in 1812, Chief Justice Mansfield, despite some misgivings, settled the English law by stating that the rule was too well established to be overruled.[6] This common law rule, which has been adopted by the Restatement,[7] is in keeping with the decision of the court.

American courts consistently followed the common law rule[8] until 1877 when a Nebraska court[9] ruled that if words are not in themselves actionable, the plaintiff must prove special damages. Other courts adopted this thinking,[10] holding that any libel not actionable on its face, required proof of special damages unless it fell into one of the four categories of slander per se.[11] Thus, libel per quod[12] was treated as slander,[13] and special damages were necessary only when the defamation fell outside the four categories.[14]

[1] Hinkle v. Alexander, 417 P.2d 586 (Ore. 1966).

[2] Ruble v. Kirkwood, 125 Ore. 316, 266 Pac. 252 (1928).

[3] Prosser, *Libel Per Quod,* 46 VA. L. REV. 839, 842 (1960).

[4] King v. Lake, Hardres 470, 145 Eng. Rep. 552 (Ex. 1679).

[5] Villers v. Morsley, 2 Wils. 403, 95 Eng. Rep. 886 (K.B. 1769); Cropp v. Tilney, Holt 422, 90 Eng. Rep. 1132 (K.B. 1693).

[6] Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (C.P. 1812).

[7] RESTATEMENT, TORTS § 569 (1938). "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

[8] Runkle v. Meyer, 3 Yeates 518 (Pa. 1803); McClurg v. Ross, 5 Binn. 218 (Pa. 1812); Steele v. Southwick, 9 Johns. 214 (15 N.Y. 1812).

[9] Geisler v. Brown, 6 Neb. 254 (1877).

[10] Weaver v. Beneficial Fin. Co., 200 Va. 572, 106 S.E.2d 620 (1959); Harrison v. Burger, 212 Ala. 670, 103 So. 842 (1925).

[11] Prosser, *supra* note 3, at 844. Prosser notes the four categories in his article as "imputation of crime, loathsome disease, defamation affecting business, or unchastity on part of a woman."

[12] BLACK, LAW DICTIONARY 1005 (3d ed. 1933). Defined as "those expressions which are not actionable upon their face, but which became so by reason of the peculiar situation or occasion upon which the words are written."

[13] Prosser, *supra* note 3, at 844.

[14] *Ibid.*

Federal law originally followed the common law rule;[15] however, a District of Columbia case[16] appears to favor the special damages rule in holding that the plaintiff is unable to collect since the defendant's article was not libel per se and no special damages were alleged.

Oregon law reflects the general confusion in this subject. In 1927, the court held that special damages must be proven when a newspaper article is not actionable per se,[17] yet a look at the Oregon precedents relied on reveals two slander cases.[18] Then in 1928,[19] it held that a letter not defamatory on its face was not actionable without proof of special damages. Two years later,[20] the court reversed itself and followed the common law rule stating that libelous words are actionable when they tend to bring one into ridicule or contempt. Twenty-nine years later, in *Hudson v. Pioneer Service Co.*,[21] the court reversed itself again and held a printed report charging plaintiff with an overdue debt as non actionable because plaintiff failed to allege special damages. Then the court in *Murphy v. Harty*[22] looked to extrinsic facts and determined that since plaintiff was a minister he was able to collect, despite his failure to allege special damages, since this was a libel per se.

Noted scholars have wrestled with this problem, and their views are almost as varied as the case law. Dean Carpenter,[23] in a law review article commenting on a decision favoring the libel per quod rule,[24] notes that the artificial distinction of libel probably grew out of a confusion and mixture of the slander and libel laws, yet he insists that libel per se and slander per se are not synonomous and criticizes the court for imposing on libel the backward rule of slander.[25]

More recently, Professor William Prosser and Laurence Eldgredge have taken opposing sides in the controversy. Mr. Eldgredge[26] favors a retention of the common law rule, and supports his contention by impressive case law beginning in 1821.[27] Professor Prosser,[28] on the other hand, cites nineteen different states which hold that an action for libel per quod cannot be maintained unless there is proof of special damages.[29] The cases mentioned indicate how the courts distinguish between libel per se and libel per quod, and how they occasionally stretch the per quod rule by requiring special damages for a remark commonly held to be derogatory without reference to extrinsic facts.[30] To help clarify the matter, Prosser suggested a revision

[15] Peck v. Tribune Co., 214 U.S. 185 (1909).
[16] Sullivan v. Meyer, 91 F.2d 301 (D.C. Cir. 1937).
[17] Peck v. Coos Bay Times Pub. Co., 122 Ore. 408, 259 Pac. 307 (1927).
[18] Barnett v. Phelps, 97 Ore. 242, 191 Pac. 502 (1920); Clark v. Morrison, 80 Ore. 240, 156 Pac. 429 (1916).
[19] Ruble v. Kirkwood, *supra* note 2.
[20] Reiman v. Pacific Devel. Society, 132 Ore. 82, 284 Pac. 575 (1930).
[21] 218 Ore. 561, 346 P.2d 123 (1959).
[22] 238 Ore. 228, 393 P.2d 206 (1964).
[23] Carpenter, *Libel Per Quod*, 7 ORE. L. REV. 353 (1928).
[24] Ruble v. Kirkwood, *supra* note 2.
[25] Carpenter, *supra* note 23, at 353-57.
[26] Eldgredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966).
[27] Thorley v. Lord Kerry, *supra* note 6.
[28] Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966).
[29] *Id.* at 1639-45.
[30] Moore v. P. W. Publishing Co., 3 Ohio St. 2d 183, 209 N.E.2d 412 (1965).

of the Restatement[31] which would require proof of special damages in all libels except those defamatory on their face or falling into one of the four categories of slander per se.

A more extreme position is taken by Harry G. Henn,[32] who advocates strict adherence to the four categories which are actionable in slander per se. An equating of libel per quod with slander would, it appears, provide relief to the more serious defamations and still not infringe upon the freedom of the people to communicate facts which they honestly believe to be non-defamatory.

A reading of the court's reasoning in *Hinkle v. Alexander*[33] reveals that the primary concern of the court was in adopting the "more workable and less confusing"[34] rule. The court finds support for its holding from cases in three states. In a Wisconsin decision,[35] the court while recognizing that a majority of the courts had adopted the libel per quod rule requiring special damages, nonetheless followed the common law rule and the Restatement[36] requiring no proof of special damages. Also cited by the Oregon court, as supporting its decision, is a recent New York Court of Appeals decision[37] which considers the publication of an engagement announcement of two persons already married. Realizing that the announcement in itself was non-defamatory, the court nonetheless stated that, under the circumstances, the announcement was a written accusation tending to hold the parties up to scorn. In disaffirming the libel per quod rule, the court concludes that "printed statements like those in this newspaper announcement about married people are libelous per se, that is, that, without a showing of special damages, they raise a presumption of inevitable actual damage to reputation."[38] The New Jersey case[39] relied on concerns a newspaper article which imputes that plaintiff, a labor editor and union leader, attended a union convention without proper credentials. The plaintiff also contends that the article labelled him as a Communist sympathizer. The court carefully considers the libel per se—libel per quod distinction and concludes that since the victim of a libel is damaged equally by a libel per se and a libel per quod when the recipient of the libel is aware of the

[31] Prosser, *supra* note 3, at 850. Professor Prosser makes this suggestion:

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is
  (a) Libel whose defamatory meaning is apparent from the publication itself without reference to extrinsic facts, or
  (b) Libel or slander which imputes to another
    (1) A criminal offense
    (2) A loathsome disease
    (3) Matter incompatible with his business, trade, profession or office
    (4) Unchastity on the part of a woman
(2) One who publishes any other libel or slander is subject to liability only upon proof of special harm.

[32] Henn, *Libel-By-Extrinsic-Fact*, 47 CORNELL L. Q. 14 (1961).

[33] *Supra* note 1.

[34] *Id.* at 589.

[35] Wisconsin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

[36] RESTATEMENT, *supra* note 7.

[37] Hinsdale v. Orange County Pub., 17 N.Y.2d 284, 270 N.Y.S. 592, 217 N.E.2d 650 (1966).

[38] *Id.* at 287, 270 N.Y.S. at 595, 217 N.E.2d at 652.

[39] Hermann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (1958).

extrinsic facts, it is irrational to require proof of special damages in one instance and not in the other.[40]

Using this case law as the legal foundation for its decision, the court continues its practical approach by rationalizing that since Oregon has a retraction statute,[41] the news media will not be adversely affected by the rejection of the libel per quod rule.[42] Finally the court states bluntly that one who is defamed "should be entitled to redress."[43]

In conclusion, the court in *Hinkle v. Alexander*, searching for a clear and practical rule, adopts the common law rule requiring no proof of special damages in any libel action. The result appears to serve the twofold purpose of resolving the case justly and of clarifying the libel law of Oregon. Yet, it does not solve the problem of nuisance suits by plaintiffs who have suffered no real damage. Rather than advocate a pendulum swing from one extreme to the other, the court, to attain a practical rule fair to both plaintiff and defendant, should have considered the means suggested by Professor Prosser.[44] A holding consistent with Professor Prosser's thinking—requiring special damages only in certain cases—would assure the plaintiff of relief in flagrant cases and yet protect the careless but innocent defendant.

[40] *Id.* at 443, 138 A.2d at 74.
[41] ORE. REV. STAT. § 30.150 (1959).
[42] Hinkle v. Alexander, *supra* note 1, at 589.
[43] Hinkle v. Alexander, *supra* note 1, at 590.
[44] Prosser, *supra* note 31.